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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR ROTH,
1111 Ainsley Bldg.
Miami 32, Florida,
NORMAN MILLER,
20 S. E. 1st Avenue,
Miami 32, Florida,
Attorneys for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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SUPREME COURT OF THE UNITED STATES

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PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Jeanette E. Gondeck prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 9, 1962.

OPINIONS OF THE COURTS BELOW.

By Findings of Fact and Compensation Order dated December 31, 1959, William M. O'Keeffe, Deputy Com-

missioner of the United States Department of Labor, Bureau of Employees' Compensation, Sixth Compensation District, in the matter of the claim for compensation under The Defense Bases Compensation Act, made an award of compensation to the Petitioner as Claimant and widow of Frank J. Gondeck, deceased, and his minor daughter Barbara Ann Gondeck. The Order is set forth at pages A14-A18, of the appendix of this petition; the decision is not reported.

On the review of the award to the United States District Court for the Southern District of Florida, Honorable Emett C. Choate, District Judge, by Findings of Fact and Conclusions of Law entered September 15, 1960 (App. A10), and Final Judgment entered November 7, 1960 (App. A14), set aside the award and enjoined enforcement thereof, by granting the motion for summary judgment filed by the employer-carrier, the Plaintiffs therein and Respondents herein. The decision is not reported.

In the appeal to the United States Court of Appeals for the Fifth Circuit, the Court affirmed the Final Judgment of the District Court and Dismissed the appeal of the United States, by judgment entered February 9, 1962 (App. A10). The opinion of the Court of Appeals has not yet been reported and is set forth in the appendix of this petition at pages A3-A9.

A petition for rehearing was denied by Order of March 7, 1962.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on February 9, 1962, and the timely petition for rehearing was denied March 7, 1962.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U.S.C., Sections 1254 (1) and 2101 (c) as well as in Rule 19 (b) of the rules of this Court under this Court's power of supervision over the Federal Judicial system, and more particularly on the grounds that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceeding and has sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

STATUTES INVOLVED

The statutory provisions involved are the Defense Bases Compensation Act, of August 16, 1941, 55 Stat. 622, 42 U.S.C. 1651 (a)(1); the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, July 26, 1956, 70 Stat. 654, 33 U.S.C. 903 (b), 920 (a), 920 (c), 920 (d), 921 (b); and the Administrative Procedure Act of June 11, 1956, 60 Stat. 237, 5 U.S.C. 1009, the pertinent portions of which are set forth in the Appendix herein.

QUESTIONS PRESENTED

1. Should the remedial humanitarian intent of a workmen's compensation act be subverted by outmoded common law principles of an equitable nature in a case where a widow and her child have been awarded compensation for the death of a worker at a defense base where the Deputy Commissioner found that the death occurred in the course of, and growing out of his employment while returning to base from reasonable recreation of type known

to and made readily available to the employees by the employer where it appears that the decedent was a passenger in a company vehicle forbidden for such use, but that decedent was never so informed?

2. Is a defense base worker within a zone of special danger and entitled to compensation for injuries and death suffered while returning to base after seeking reasonable recreation and entertainment of a type known to the employer and made more readily available to the employees, although such recreation and entertainment was not furnished or supervised by the employer?

3. Does the Administrative Procedure Act grant the Federal Courts the power to reweigh the evidence and inferences drawn therefrom in the review of an award of compensation for death based on stipulated facts in a Defense Bases Compensation case?

STATEMENT OF THE CASE

The case was submitted to the Deputy Commissioner on stipulated facts. They are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case (R. 105-107), and in this appendix, pp. A4-A6.

However, briefly stated in the interest of continuity, Frank Gondeck was employed as a civilian worker at the United States Air Force Base, San Salvador Island, B.W.I.

He was on duty eight hours and off 24, subject to emergency call at all times. On April 24, 1958, he went to nearby Cockburn Town in a jeep driven by James F. Norman; Fox Fry and R. M. Smith were also passengers. They had one beer, and on the return, almost at the gate,

the jeep overturned. Gondeck was injured, and died on April 27, 1958.

Smith and Norman had been warned not to use the jeep for personal missions; Gondeck had not been so informed.

The Deputy Commissioner entered an award of compensation and funeral expenses to the widow and surviving child. On review the District Judge set aside the award and enjoined enforcement. The Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Reversal of the decisions of the Court of Appeals and the District Court and reinstatement of the award of compensation by the Deputy Commissioner is sought because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment.

The Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeals in holding defense base workers may not be compensated for injuries or death suffered on return trips to their bases from reasonable recreation trips to town if the recreation is not furnished and supervised by the employer; in transportation not provided by the employer for the specific purpose, and that the employer must receive some tangible benefit as contrasted to improvement of worker morale, which the Court denotes an intangible immaterial benefit.

The Court of Appeals for the Fifth Circuit departed from the opinions of this Court and other Courts of Appeals

by setting aside an award of compensation for death suffered by a defense base worker while returning to base in a company vehicle.

The Court of Appeals for the Fifth Circuit has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault, where the violation resulted in decedent's death.

The Court of Appeals for the Fifth Circuit has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority.

POINT I

The Deputy Commissioner Properly Awarded Compensation for Death of a Defense Base Worker Who Was Killed While Returning to Base from a Trip to Town While Seeking Reasonable Recreation.

Reasonable recreation is an incident of civilian employment at a United States military base in a foreign land. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). This principle is so deeply ingrained into the Defense Bases Act that it cannot be reasonably controverted.

In other jurisdictions, the same principle has been consistently followed, and compensation awarded:

Hastorf-Nettles v. *Pillsbury*, 203 F.2d 641 (9th Cir. 1953) (returning to defense base from county fair).

C. V. Lytle Co. v. *Whipple*, 156 F.2d 154 (9th Cir. 1944).

Liberty Mutual Ins. Co. v. *Gray*, (McClees' case) 137 F.2d 926 (9th Cir. 1943) (returning to defense base after overstaying leave).

Turner v. *Willard,* 154 F. Supp. 352 (S.D.N.Y. 1956) (returning to defense base from bowling league conference).

Travelers Ins. Co. v. *O'Hearne,* (Wilson's case) No. 1436, E.D. Va. (1953) (unreported) (returning to defense base in jeep).

Travelers Ins. Co. v. *O'Hearne,* (O'Mara's case) No. 1429, E. D. Va. (1954) (unreported) (killed in Algiers chasing thief who grabbed his wallet at a movie line).

The State acts seem to follow this rule:

Lamm v. *Silver Falls Timber Co.,* 286 Pac. 527 (Ore. 1930) (returning to lumber camp from home).

Gabumas v. *Pan American World Airways,* 188 N. Y. S. 2d 372 (1951) (stewardess in bicycle mishap during layover in Paris).

Lewis v. *Knappen-Tibbetis-Abbott Eng. Co.,* 108 N.E.2d 609 (N.Y. 1952) (shot by sniper while sightseeing in Jerusalem).

In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment.

Warren v. *United States,* 340 U.S. 523 (1951).

Farrell v. *United States,* 336 U.S. 511 (1949).

The Fifth Circuit's proposition that benefit to the employer must be shown to provide coverage for recreational injuries is in direct conflict with this Court.

The Fifth Circuit said herein:

> "No benefit to the employer has been shown to result from the going by GONDECK to a native club for a beer unless it be the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such excursion."

On the other hand, this Court said in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*:

> "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer." 340 U.S., 507.

The Act creates the presumption of coverage. Title 33, U.S.C. 920(a).

The presumption is strengthened by the sparsity of defenses granted the employer by Congress. Title 33, U.S.C. 903(b). Possible administrative misinterpretation of workers' rights is minimized by the further presumption that the worker is not guilty of violating either of the prohibitions. Title 33, U.S.C. 920(c, d); *C. V. Lytle Co.* v. *Whipple,* 156 F.2d 154 (9th Cir. 1944).

These sections are indicative of the Congressional intent.

This Court has propounded and consistently followed the doctrine of liberal interpretation of remedial legislation to accomplish the beneficial intent of Congress. *Cox* v. *Roth,* 348 U.S. 207 (1955); *Pillsbury* v. *United Engineering Co.,* 342 U.S. 197 (1952). The Fifth Circuit has departed from this doctrine.

The Deputy Commissioner made a proper award, and it should be reinstated.

POINT II

The Deputy Commissioner Properly Rejected Outmoded Common-Law Conceptions of Scope of Employment and Held the Decedent Was Injured Within a Zone of Special Danger.

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 511, this Court said:

> "Workmen's compensation is not confined by common-law conceptions of scope of employment. * * * All that is required is that the obligations and conditions of employment create the 'zone of special danger' out of which the injury arose".

The Fifth Circuit has removed that protective mantle and has reinstated common-law conceptions of scope of employment—except that at the employer's pleasure, he can decide to furnish some recreation. The doctrine of "zone of special danger" has been discarded by the Fifth Circuit.

This narrowing of the protection of the Act by the Court of Appeals requires review by this Court.

POINT III

The Deputy Commissioner Properly Held That the Decedent Was Covered by the Act for Death Suffered While Returning to Base in a Company Jeep.

Workers are generally held covered by compensation while they are returning to a place of employment away from home.

Where a defense base worker lived one mile from base, but went to town 17 miles away and overstayed his leave, he was awarded compensation for injuries suffered in an accident in a truck he caught to return to base. *Liberty Mutual Ins. Co.* v. *Gray,* 137 F.2d 926 (9th Cir. 1943).

A worker hitched a ride back from a fair 50 miles away and was injured, and awarded compensation. *Hastorf-Nettles, Inc.,* v. *Pillsbury,* 223 F.2d 641 (9th Cir. 1953). See also, *C. V. Lytle Co.* v. *Whipple,* 156 F.2d 154 (9th Cir. 1944).

Frank Gondeck was returning to his base where he was subject to call 24 hours a day. The fact is that he was returning to the base from town. Had he gone in by

bus and hitched back, he would have been covered. The company rules permit employees to hitch back from town. Gondeck was certainly in at least a comparable position to hitch hiker.

POINT IV

The Deputy Commissioner Properly Refused to Penalize the Claimant for Violation of a Non-communicated Unenforced Company Rule.

Nothing in the Act permits an employer to make rules prescribing the limits of coverage, or makes the violation of a company rule grounds to deny coverage. Title 33, U.S.C. 903(b).

O'Leary v. *Brown-Pacific-Maxon Inc.*, 340 U.S. 504 (1951).

Bull Insular Line v. *Schwartz*, 23 F. Supp. 354 (E.D. N.Y. 1938).

Penn Stevedoring Corp. v. *Cardillo*, 72 F. Supp. 991 (S.D. N.Y. 1947).

However, the District Judge specified his reasons for reversal: Gondeck was injured while violating two company regulations regarding the jeep. (Appendix A12).

However else the opinion of the Court of Appeals attempts to avoid this obviously erroneous interpretation of the Act, the holding impliedly adopts it, and Mrs. Gondeck and her daughter are being penalized for the violations of Smith and Fox. Frank Gondeck did not violate the company rule. Justice cries against such a result.

POINT V

The Administrative Procedure Act Does Not Broaden the Scope of Judicial Review.

The Court of Appeals stated its interpretation of the Administrative Procedure Act as to the scope of judicial review of administrative agency orders as follows:

> "This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

Presumably, the Court of Appeals would have reinstated the compensation award except that it conceived that under the Act it had authority to reweigh the evidence. This is submitted to be a misconception of the Congressional intent in the passage of the Act.

The Court of Appeals correctly quoted this Court's interpretation of the Act from *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, but misapplied the statement of law by the implication that the Act changed the existing body of law. This Court affirmed a three-judge Court of the Eastern District of Missouri, wherein that Court said:

> "Plaintiffs also refer to section 10 of the Administrative Procedure Act, 5 U.S.C.A., § 1009, but it is clear that that Act merely was a declaration of existing law when judicial review is provided." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892 (1955).

The Fifth Circuit is in direct conflict with this Court's affirmance of the three-judge Court of the Eastern District of Missouri by holding that the Administrative Procedure Act widened the scope of judicial review.

This Court's interpretations of the scope of judicial review, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), were not adhered to.

POINT VI

The Factual Situation Herein Is Not Singular But Is Recurring.

For some reason or other, defense base workers are frequently involved in serious accidents during recreation and while returning to base.

We know that District Judge Simpson, who sat on the appellate argument below, is awaiting this Court's ruling for guidance on one other case now pending before him for review. The Deputy Commissioner has at least two more cases involving the same legal issues.

Government contractors recruit workers for defense base employment, and cite as inducement the glamorous and exotic life abroad, and the full protection of compensation.

Having induced the workers away from home, the protection of the Act is being withdrawn by the discovery of "judicial small print" when they seek to relieve the tediousness of base life by going to town.

In the ever expanding space age defense program, the Fifth Circuit states will be, as it is now, the principle area for determination of claims under the Defense Bases Act.

With conflicts between Circuits now existing in the interpretations of the Compensation Act, and with one of the judges from the Court below still uncertain of his own ruling, it is submitted that review by this Court of the judgment is required to resolve the issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

.....,

ARTHUR ROTH,
1111 Ainsley Bldg.
Miami 32, Florida,
Counsel for Petitioner.

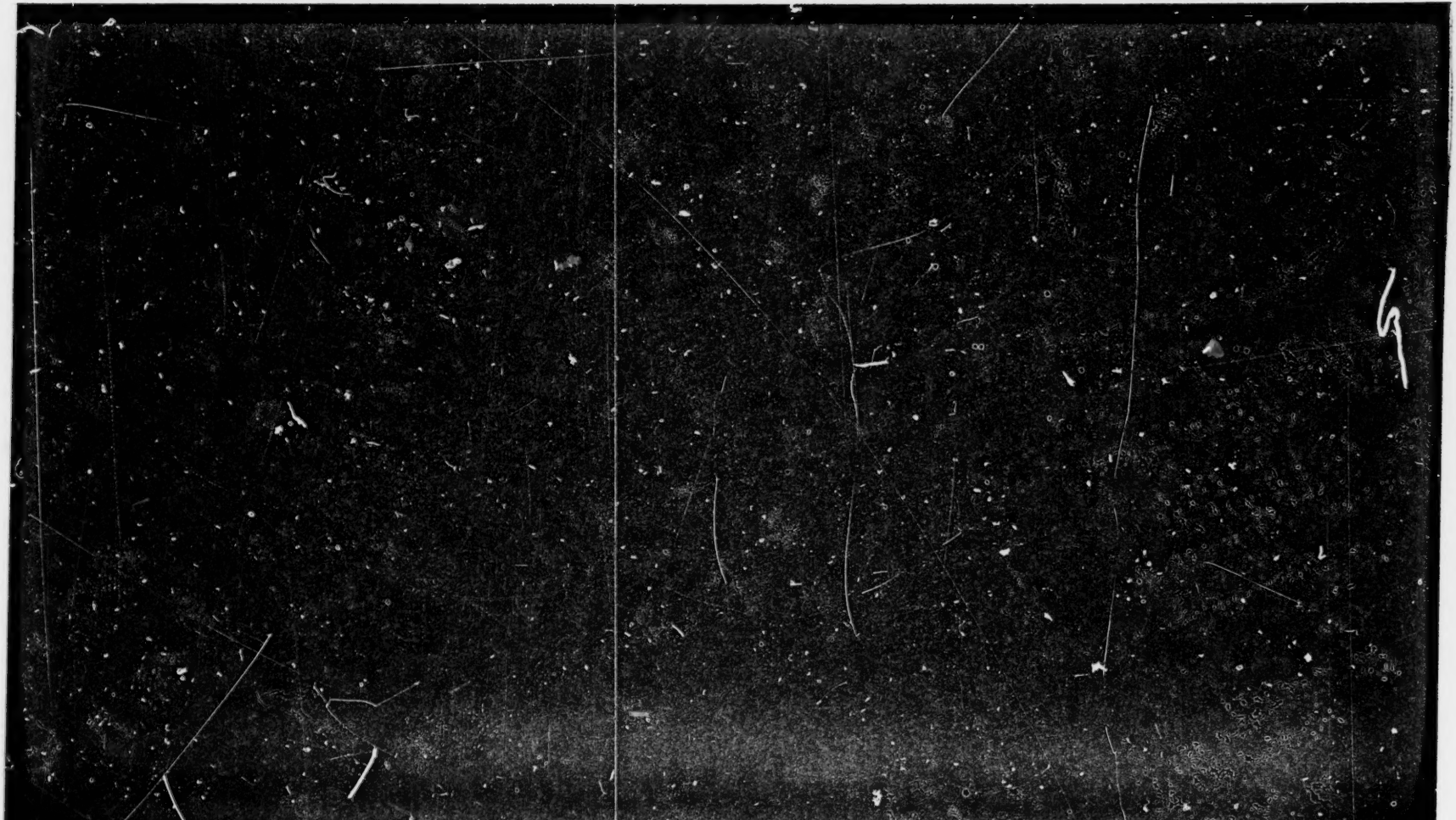
.....,

NORMAN MILLER,
20 S. E. 1st Avenue,
Miami 32, Florida,
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Certiorari were mailed to Leo Alpert, Biscayne Building, Miami 32, Florida, E. Boardman, U. S. District Attorney and the Attorney General, this ..... day of April, 1962.

.....



STATUTES INVOLVED

5 U.S.C. 1009.

"* * * the reviewing court shall decide all relevant questions of law * * * It shall * * * hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * *; (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the record * * *"

42 U.S.C. 1651.

Compensation authorized—places of employment.

a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment,

(1) at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government.

33 U.S.C. 920.

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary,

a) That the claim comes within the provisions of this chapter.

c) That the injury was not occasioned solely by the intoxication of the injured employee.

d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

33 U.S.C. 903.

Coverage.

b) No Compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. 921(b).

Review of compensation orders.

b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18897

UNITED STATES OF AMERICA and
JEANETTE E. GONDECK, Intervenor,
Appellants,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED,
and THE TRAVELERS INSURANCE COMPANY,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(February 9, 1962)

Before JONES and BELL, Circuit Judges, and SIMPSON, District Judge

JONES, Circuit Judge: The district court set aside an order of William M. O'Keeffe, Deputy Commissioner, Department of Labor, by which compensation was awarded to Jeanette E. Gondeck for the death of her husband, Frank J. Gondeck, pursuant to the provisions of the Defense Base Compensation Act, 42 U.S.C.A., § 1651 et seq. By this statute the employees under it were covered by the provisions of the Longshoremen's and Harbor Work-

ers' Compensation Act, 33 U.S.C.A., § 901 et seq. The evidentiary facts are stipulated. The inferences drawn from the stipulated facts by the Deputy Commissioner and his findings are challenged.

Frank J. Gondeck, a Florida resident, was employed by Pan American World Airways in March, 1958, as a diesel generator operator at a defense base on San Salvador Island, British West Indies. His work required him to put in an eight-hour shift on the job after which he was off twenty-four hours. He was subject to call for emergencies when off duty. He lived at a dormitory on the Base. There was a recreation center on the Base known as the Reef Club. At Cockburn Town, about three miles from the Base, was a night club known as the Blue Marlin Club. Pan American operated a bus on a regular schedule for transporting its employees, without charge, between the Base and the town. Pan American supplied a jeep for transporting the diesel operators to and from the several generating plants.

Gondeck went off duty at 4:00 o'clock on the afternoon of April 24, 1958. With seven or eight other employees he went to the Reef Club where they sat around drinking champagne, with time out for chow, until about 7:30 o'clock in the evening when Gondeck, in the company of James F. Norman, Fox F. Fry and R. M. Smith, took off in the jeep for town. They went to the Blue Marlin, a native club, where they stayed for about fifteen minutes, had a beer, and started back to the Base with Norman driving the jeep. The use of the jeep for personal missions of employees was forbidden by Pan American. Norman and Smith had been warned a few days earlier that the jeep was not to be used except for official business. It was not shown whether this was known by Gondeck. As the jeep approached the gate to the Base, it went out of control,

skidded, and turned over. Smith was killed. Gondeck sustained brain injuries from which he died three days later. In his order making an award of compensation the Deputy Commissioner found, among other things, that Gondeck had completed his day's work and was, on the journey to Cockburn Town, seeking reasonable recreation and entertainment, that he was on call for emergency duty. An award was made to the widow for herself and the child of the decedent by the Deputy Commissioner against Pan American and Travelers Insurance Company, its compensation insurance carrier.

Pan American and the Travelers Insurance Company brought suit against the Deputy Commissioner to set aside the award and to enjoin its enforcement. The United States Attorney represented the Deputy Commissioner in the litigation. Jeanette E. Gondeck intervened. On September 15, 1960 (and here the dates begin to become important), the district court made and filed findings of fact and conclusions of law in which it was stated that there was no substantial evidence that Gondeck was engaged in the scope of his employment at the time of his injury or that his injury and subsequent death arose out of or in the course of his employment. It was concluded that the award should be set aside. On September 21, 1960, the Deputy Commissioner filed a motion to amend the findings and conclusions or for a new trial. On September 26, 1960, Mrs. Gondeck filed a similar motion. The court's judgment setting aside the award and enjoining its enforcement was dated November 7, 1960, and filed on the following day, November 8, 1960. On November 16, 1960, orders were entered denying the two motions. On January 13, 1961, the United States, which was never a party to the suit, filed a notice of appeal, not from the judgment, but from the order "denying Motion to Amend Findings of Fact and Conclusions of Law and denying Motion for New

Trial." On January 13, 1961, the intervenor filed a notice of appeal from the final judgment of November 8, 1960, and the order of November 16, 1960. The appellees have moved to dismiss the appeal of the United States on the ground that it was not and is not a party and has no right to appeal, that the order on the motion for which it attempts to appeal is not a final order and that the appeal was not taken within the time permitted by the rules. The appellees also move to dismiss the appeal by the intervenor on the ground that her appeal was not taken within the prescribed time.

We think there must be a dismissal of what purports to be an appeal of the United States. It was not a party to the proceedings in the district court and would not have been a proper party had it sought to become one. The identity of the United States and of the Deputy Commissioner are separate. No notice of appeal was filed by the Deputy Commissioner although the United States Attorney filed in his name a statement of "points on appeal" and a designation of the record on appeal. These do not make an appellant out of either the United States or the Deputy Commissioner. These matters do not preclude the intervenor, Jeanette E. Gondeck, from taking an appeal by the timely filing of a notice of appeal. Whether she has done so is one of the questions for our decision.

The appeal of the intervenor was, we conclude, taken within the prescribed time. The running of the time for taking an appeal is suspended until disposition is made of a timely motion to amend or make additional findings of fact. Rule 73 (a), Fed. Rules Civ. Proc., 28 U.S.C.A. Where, as in the case here, the motion presented a substantial question and the motion is not disposed of either expressly or by necessary implication, by the judgment, the rule is applicable although the motion was made be-

fore but not overruled until after the judgment. *Phinney* v. *Houston Oil Field Material Co.*, 5th Cir., 1958, 252 F. 2d 357; *Partridge* v. *Presley*, 88 U.S. App. D.C. 298, 189 F. 2d 645, cert. den. 342 U.S. 850, 72 S. Ct. 79, 96 L. Ed. 642. Cf. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160. The order on the motion was entered November 16, 1960. The Intervenor's notice of appeal was filed on January 13, 1961. The Deputy Commissioner was an officer of the United States and therefore the time of taking an appeal was sixty days as to all parties, including the intervenor. 28 U.S.C.A., § 2107, Rule 73 (a) supra.

The intervenor-appellant asserts that "In the absence of a finding that Gondeck was injured and killed within the terms of Sec. 903 (b),[1] the award must be reinstated. This is not an accurate statement, at least since the passage of the Administrative Procedure Act,[2] of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456. The intervenor urges the proposition that Gondeck was entitled to seek recreation away from the base where he was employed as an incident of his employment and, having received the injuries resulting in his death in returning from a recreational excursion, it follows that death benefits under the Act are payable. The doctrines applicable cannot be stated by such a broad

---

1. No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. 33 U.S.C.A., § 903(b).

2. 5 U.S.C.A. §§ 1001-1011.

theorem. Professor Larson, thus announces the general principles:

> "Recreational or social activities are within the course of employment when
>
> "(a) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> "(b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "(c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1 Larson's Workmen's Compensation Law 328, § 22.00.

The stated tests are not here met. We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purposes. The intervenor contends that Gondeck was subject to call at all times and that this, in some manner made his fatal injury an occurrence in the course of employment. The premise is unsupported and it is the Deputy Commissioner's finding that Gondeck was injured and killed "when, having completed his day's work" he journeyed to town, drank a beer, and was returning to his quarters. The injury did not occur on the employer's premises nor during the employee's working time. The injury and death of Gondeck were wholly disassociated from his employment environment. He had not been using recreational facilities

furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer. No benefit to the employer has been shown to result from the going by Gondeck to a native club for a beer unless it be for the intangible and, we think, immaterial benefit of improvement of morale that might be the consequence of such an excursion. The trip cannot be regarded as necessary travel to and from work. We find no evidence that furnishes a link by which the activity in which Gondeck was engaged was related to his employment. Larson, supra, 328-342, §§ 22.00-22.30; 99 C.J.S. 737 et seq., Workmen's Compensation, § 221 c; 58 Am. Jur. 743; Workmen's Compensation § 237; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, supra; *Ward* v. *Cardillo*, D.C. Cir. 1943, 77 App. D.C. 343, 135 F.2d 260; *N. L. Demara* v. *Employers Liability Assurance Corp.*, 5th Cir. 1953, 250 F.2d 799, cert. den. 358 U.S. 845, 79 S. Ct. 69, 3 L. Ed. 2d 79; *National Surety Corporation* v. *Bonds*, 5th Cir. 1960, 275 F.2d 389, cert. den. 364 U.S. 849, 81 S. Ct. 93, 5 L. Ed. 2d 73; *Brown-Pacific-Maxon, Inc.*, v. *Pillsbury*, D.C.N.D. Calif. 1953, 132 F. Supp. 421.

The appeal of the United States will be DISMISSED.

The judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order is

AFFIRMED.

Judgment of the Court of Appeals

Extract from the Minutes of February 9, 1962.

No. 18897

UNITED STATES OF AMERICA and JEANETTE E. GONDECK,
Intervenor,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED, and THE TRAVELERS INSURANCE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal of the United States in this cause be, and it is hereby, dismissed; and that the judgment of the District Court setting aside and enjoining the enforcement of the Deputy Commissioner's order be, and it is hereby, affirmed.

* * *

[Title Omitted]

Findings of Fact and Conclusions of Law of District Court

This matter having come on before the Court on the motions for summary judgment and for review of the findings of the Deputy Commissioner upon the parties stipulated record for review, and the Court having examined the record, the pleadings herein and the briefs of counsel and, being fully informed in the premises, the Court thereupon enters its Findings of Fact and Conclusions of Law,

FACTS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The plaintiffs, Pan American World Airways, Inc. (Pan Am), and The Travelers Insurance Company, brought this action to review the findings of the defendant, William M. O'Keeffe, Deputy Commissioner, Sixth Compensation District (Deputy) granting an award to Jeanette E. Gondeck, the widow of Frank J. Gondeck, an employee of the plaintiff Pan Am.

2. Frank J. Gondeck, according to the undisputed, stipulated facts of record in this case, was, on April 24, 1958, an employee of Pan Am on San Salvador Island, British West Indies, having been transported there, fed and housed while there, at his employer's expense.

3. On April 24, 1958, Gondeck completed his scheduled eight-hour shift, came off duty, returned to his quarters, cleaned up, availed himself to some extent of the employer furnished recreation facilities on the base, drank some alcoholic beverage of unspecified amount (apparently not in excess), left the employer's government base in the company of several fellow employees in a company-owned jeep, the use of which had been denied employees for other than company business, in contravention of the employer's regulations, and despite the fact that the employer had furnished scheduled bus transportation to Cockburn Town, this party's destination.

4. Having arrived at Cockburn Town via the company jeep, Gondeck and his companions had a "Beer" at a native tavern, and, again contrary to company orders, picked up a native to give him a ride back to the base; on the return trip, before reaching the base, the jeep overturned seriously injuring Gondeck, from which injuries Gondeck died several days later.

5. The decedent was subject to call at all times in any emergency, but, not only was he not on call, nor on active duty, nor on any business in any way connected with his employment, but he and his companions were at the time of the injury, actively engaged solely in a pleasure trip of their own and in violation of two of their employers regulations regarding the jeep in which they were injured.

6. In a careful review of this record this Court is not only unable to discover any substantial evidence to support the findings of the Deputy, but it is unable to find any evidence in support of the findings before it for review.

7. The decedent's widow, Jeannette E. Gondeck, was allowed to intervene herein in support of the Deputy's award.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this case pursuant to the provisions of Title 33, U.S.C., Section 921, and Title 42, U.S.C., Section 1653, as made applicable to this case by Title 42, U.S.C., Section 1651.

2. The decedent-employee, Frank J. Gondeck, at the time of his death was an employee within the provisions of the Defense Bases Compensation Act.

3. The record contains no substantial evidence to support the Deputy's implicit finding that the decedent was engaged within the scope of his employment or that his injury and subsquent death arose out of or in the course of his employment.

4. There being no substantial evidence to support the findings of the Deputy, said findings are erroneous

and should be reversed and remanded for proceeding consistent with the decision of this Court.

Upon presentation of a final order in conformity with these Findings and Conclusions of Law, Judgment will be entered herein.

Dated at Miami, Florida, this 15th day of September, 1960.

/s/ EMETT C. CHOATE
United States District Judge

[Title Omitted]

Final Judgment of District Court

THIS CAUSE having come on before the Court on the Complaint of the Plaintiffs to enjoin a Compensation Order entered by the Defendant WILLIAM M. O'KEEFFE, Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, and Answers having been filed by the Defendant and by the widow of the deceased Employee who petitioned for leave to intervene and who was permitted so to do, and the Court having examined the Record, and Briefs having been submitted, and the Court having heretofore on September 15, 1960, entered its Findings of Fact and Conclusions of Law, and the Record containing no substantial evidence to support the Findings of the Deputy Commissioner and said Findings being not in accordance with the law it is

ORDERED, ADJUDGED AND DECREED that:

1. The Compensation Order of WILLIAM M. O'KEEFFE, Deputy Commissioner, Sixth Compensation District, dated December 31, 1959, bearing File No. DB-C-773-373 awarding compensation to Jeanette E. Gondeck and Barbara Ann Gondeck, respectively the surviving

spouse and child of Frank J. Gondeck, deceased, be and the same hereby is suspended and set aside in whole;

2. A permanent injunction be and it hereby does issue against the said Deputy Commissioner, his officers, agents and employees, restraining enforcement of the aforesaid Order, permanently;

3. The aforesaid Deputy Commissioner be and he is hereby directed to set aside the said Order and enter an Order dismissing the claim.

DONE AND ODERED in the City of Miami, Dade County, Florida, on this 7th day of November, 1960.

EMETT C. CHOATE

District Judge

[Title Omitted]

Compensation Order of Deputy Commissioner

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 24th day of April, 1958, the decedent herein, Frank J. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, was in the employ of the employer herein, Pan American World Airways, Incorporated, of Post Office Box 4187, Patrick Air Force Base, Florida, a contractor with the United States at San Salvador Air Force Base, San Salvador Island, British West Indies, in the Caribbean Compensation District, established under the provisions of the Defense Base Compensation Act (Public Law 208—77th Congress as amended), and that the

liability of the employer for compensation under the said Act was insured by The Travelers Insurance Company; that the case was transferred to the Sixth Compensation District in accordance with Section 19 (g) of the said Act with the approval of the Bureau of Employees' Compensation; that on the said day the decedent herein sustained personal injury resulting in his disability and subsequent death when, having completed his day's work and seeking reasonable recreation and entertainment, the decedent journeyed to Cockburn Town, a native village on San Salvador Island, British West Indies, drank one glass of beer, rode in a jeep back toward the decedent's living quarters, and the jeep overturned on the road, which resulted in a fracture of the decedent's skull and an epidural hemorrhage; that the decedent was paid in full for the day of the accident and died on April 27, 1958, as a result of the injuries sustained on April 24, 1958; that temporary total disability did not extend beyond the three-day waiting period; that the decedent was a passenger in a jeep being driven by another person when the accident occurred; that intoxication of the decedent was not the sole cause of the accident; that the decedent was on call for emergency duty by the employer herein twenty-four hours per day as long as the decedent was on the island; that the decedent did not remove himself from a possible emergency call to duty on the day of the accident; that the employer provided the decedent with food and lodging as well as pay; that the employer knew the decedent and co-employees journeyed regularly to Cockburn Town for recreation and entertainment; that the employer to make the recreation and entertainment found in Cockburn Town more readily available to the decedent and other employees provided the employees with free transportation to Cockburn Town; that written notice of the injury and subsequent death was not given to the em-

ployer within thirty days, but the employer had knowledge of the injury and subsequent death and has not been prejudiced by lack of such written notice; that the employer provided the decedent with medical treatment, etc., in accordance with the provisions of Section 7 (a) of the said Act; that the average weekly wage of the decedent herein at the time of the injury amounted to more than $81.00; that the claimant herein, Jeanette E. Gondeck, who was born on April 26, 1913, and married to the decedent on May 3, 1932, is the surviving widow of the decedent herein, Frank J. Gondeck, and is entitled to death benefits for herself at $28.35 per week (35% of the maximum average weekly wage of $81.00); that Barbara Ann Gondeck, who was born on August 29, 1940, is the surviving child of the decedent herein, Frank J. Gondeck, and that Jeanette E. Gondeck, mother and natural guardian of the child, is entitled to death benefits for the support of the said child at $12.15 per week (15% of the maximum average weekly wage of $81.00); that the surviving child, Barbara Ann Gondeck attained the age of eighteen years on August 29, 1958; that the funeral expenses of the decedent amounting to $1,083.05 were paid by the claimant, Jeanette E. Gondeck, and she is entitled to reimbursement in the sum of $400.00 on account of such expenditures; that the accrued death benefits to which Jeanette E. Gondeck is entitled for the support of the said child from April 27, 1958, to August 28, 1958, inclusive, is 17 5/7th weeks at $12.15 per week in the amount of $215.23; that the accrued benefits to which Jeanette E. Gondeck is entitled to for herself as the surviving widow from April 27, 1958 to December 30, 1959, inclusive (87 4/7th weeks at $28.35 per week), amount to $2,482.65; that the total accrued death benefits to which Jeanette E. Gondeck is entitled to for herself and for the support of the said child to December 30, 1959, inclusive, amounts to

$2,697.88; that the employer and the insurance carrier have paid nothing to the claimant as compensation; that the services and expenses of Thomas G. Spicer and Gay, Hyman and Anderson, Attorneys for the claimant, were necessary and the reasonable value of such services and expenses is $500.00.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer herein, Pan American World Airways, Incorporated, and the insurance carrier herein, The Travelers Insurance Company, shall pay to the claimant herein, Jeanette E. Gondeck, of 1200 Northeast 144th Street, Miami, Florida, death benefits as follows: 17 5/7th weeks at $12.15 per week for the support of Barbara Ann Gondeck, surviving child of the decedent, Frank J. Gondeck, from April 27, 1958, to August 28, 1958, inclusive, which is $215.23, and 87 4/7th weeks at $28.35 per week from April 27, 1958, to December 30, 1959, inclusive, which is $2,482.65 for death benefits due the widow, a total amount of $2,697.88 for death benefits to December 30, 1959, inclusive, all of which has accrued and the employer and the insurance carrier are directed to pay forthwith in one sum, less attorneys' fees hereinafter provided, and to continue payments thereafter in bi-weekly installments at $28.35 per week to Jeanette E. Gondeck, surviving widow of the decedent, Frank J. Gondeck, subject to the limitations of the said Act, or until otherwise ordered.

The employer herein and the insurance carrier herein are also directed to pay the sum of $400.00 to the claimant, Jeanette E. Gondeck, as reimbursement for funeral expenses.

A fee in the sum of $500.00 for services and expenses rendered on behalf of the claimant is hereby approved in favor of Thomas G. Spicer, Attorney, 819 Seybold Building, Miami, Florida, and Gay, Hyman and Anderson, Attorneys, 913 Ainsley Building, Miami, Florida, and made a lien on the accrued death benefits.

Given under my hand at Jacksonville, Florida, this 31st day of December, 1959.

(Sgd.) WILLIAM M. O'KEEFFE

William M. O'Keeffe, Deputy Commissioner
Sixth Compensation District.

MAY 28 1962

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LEO M. ALPERT
Attorney for Respondents
1112 Biscayne Building
Miami 32, Florida

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I

THE QUESTIONS

In this case there are no special nor important nor substantial reasons for certiorari.

Petitioner asseverates there are, however, and proposes three strawmen in her "Questions Presented". We cannot agree that those straw questions are the questions in this case.

The first two questions (which as put by Petitioner are distortions and omissions) are comprehended, we suggest without partiality to either side, by this question which we put to the Court below as the controlling question in this case (see our Brief below at page 13):

> "The question at bar is whether an employee hired to work out of the United States on a Bahama island who is injured (and dies) when a jeep overturned in which he was a passenger while away from the employer's premises on a private (i.e. not employer sponsored or aided) recreational trip of his own has suffered an injury 'arising out of and in the course of employment'. [33 U.S.C.A. Sec. 902(2)]"

Or, if a different formulation be preferred, the question might be phrased by putting the following West Syllabus to this case in interrogative form: See 299 F.2d at 74, Syllabus 5:

> "Where diesel generator operator at defense base in British West Indies was subject to call for emergencies when off duty, there was recreation center on base, employer transported employees without charge by bus to town and employees were prohibited from using jeep for recreation purposes, death of operator while returning in jeep from native club in town where he had had a beer after working hours did not arise out of or in the course of employment and hence was not compensable. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et

seq., 33 U.S.C.A. Sec. 901 et seq.; 42 U.S.C.A. Sec. 1651 et seq."

The third question put by Petitioner is not only a distortion and omission but a peculiar turnabout.

For it was the Petitioner who argued to the Court below that the Administrative Procedure Act had nothing to do with this case at all; that the Deputy Commissioner's inferences are: "unreviewable" (Gondeck Brief below, page 13), "are not judicially reviewable" (ibid); etc. And it was we who pointed out the law now stated by Petitioner to be correct and applicable.

And so it was that the Court below said: See Opinion at A. 7 of Petitioner's Petition here:

> "The Intervenor-Appellant asserts that 'In the absence of a finding that Gondeck was injured and killed within the terms of Section 903(b), the award must be reinstated.' This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 740, 95 L. Ed. 483; Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456. ***"

And so it is that, and quite contrary to Petitioner's question, West Syllabus Note 4 reads:

"Deputy Commissioner's findings, in compensation case, are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et seq., 33 U.S.C.A. Sec. 901 et seq.; Administrative Procedure Act, Secs. 1-12, 5 U.S.C.A. Sec. 1001-1011."

II

REASONS FOR GRANTING THE WRIT

The above is another of Petitioner's captions.

The first reason advanced is "because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment". This of course is sheer *ipse dixit* and not a reason but a conclusion. No more need be said on that.

The second reason advanced is that the Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeal. There is no conflict and in our Brief below we challenged Petitioner then to submit a reported federal case holding compensable an injury suffered while engaged in private (i.e., non-employer sponsored or aided) recreational activity. There isn't any. In truth the only reported federal decision on point is squarely with us: **Brown-Pacific-Maxon Inc. v. Pillsbury,** 132 F.S. 421 (D.C. Calif. S.D. 1953).

Attached to that second reason is another: that the

Court of Appeals for the Fifth Circuit is holding that the employer must receive some tangible benefit as contrasted to improvement of work or moral. The Court did not so require. Instead what the Court was talking about was that factor together with other factors. This will more plainly appear later and is obvious from the face of the opinion.

The third reason is that the Court of Appeals for the Fifth Circuit "departed from the opinions of this court and other courts of appeal by setting aside an award of compensation for death suffered by defense base worker while returning to base in a company vehicle". That of course is not the fact in this case. The fact in this case is as the Court of Appeals stated:

> "He had not been using recreational facilities furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer." (A. 8-9)

The fourth reason is that the Court of Appeals for the Fifth Circuit "has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault". Again that is not the holding below nor the facts in this case. The holding below is that:

> " *** We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's

> jeep which the employees were prohibited from using for such purposes. ***" (A. 8)

The fifth reason is that the Court of Appeals for the Fifth Circuit "has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority." We have already pointed out that this represents a most peculiar turnabout on the part of the Petitioner who argued below that the Administrative Procedure Act had nothing to do with this case at all, etc. Of course the Court did not do what Petitioner says it did.

We note that the Petitioner has omitted as an appendix the stipulated facts upon which the Deputy based his Order.

We have therefore attached as an Appendix to this Brief the Stipulation.

It cannot be too strongly emphasized in this connection that, as the Court of Appeals pointed out but did not dwell particularly on, the evidentiary facts were stipulated and it was the Deputy Commissioner's inferences and legal conclusions drawn from those facts that were reviewed. When Petitioner states that the facts " . . . are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4) it becomes apparent that we are dealing with questions of law and the point about misapprehending the scope of judicial review is just talk.

We will go into this more when we treat the particular points that the Petitioner makes.

POINT I

We are using Petitioner's captions. Under this particular head the Petitioner makes the argument that reasonable recreation is an incident of civilian employment at a United States Military Base in a foreign land, citing the **O'Leary v. Brown-Pacific-Maxon** decision of this Court and other decisions.

But **O'Leary** held only that the employer had made reasonable recreation an incident of the employment at the defense base and turned largely on the "zone of special danger" that had been created or allowed to come to pass by the employer in that case. **O'Leary** has always struck us as being very much akin to a mother locking her children in the back yard where there is a swimming pool, telling the children not to go in, then going downtown shopping, and being much surprised when on her return home she finds that the children have gone into the pool and drowned.

The other cases cited by Petitioner are all cases dealing with injuries that occurred while the employee was using employer provided or sponsored recreational facilities or employer provided or sponsored transportation. We quarrel with none of them. They are inapplicable to the case at bar.

Taking the cases one by one as they are cited by the Petitioner:

In **Hastorf-Nettles,** the employee was returning to camp **in the employer provided truck** when the accident occurred in which he was injured.

In the **Lytle Co. v. Whipple** case the employee was returning to his barracks **in the company truck** when he was killed and the Court cited the next following case, **Liberty Mutual Ins. Co. v. Gray** in support of its holding. We have no quarrel with any of these cases.

In **Liberty Mutual Ins. Co. v. Gray,** compensation liability had attached with the **employer provided transportation:** the employee was on his way back to his construction camp on Oahu in a truck provided by the employer to transport employees from Honolulu to the camp.

Turner v. Willard involved an injured claimant who was a captain of one of the bowling leagues organized by and sponsored by the employer. **He was on bowling league business.**

Travelers Insurance Company v. O'Hearn is an unreported case. We consider the citation of an unreported case to be entirely improper because there obviously is no report to examine. The same comment is applicable to the other **Travelers Insurance Company v. O'Hearn case.**

The State cases that are cited by Petitioner are: **Lamm v. Silver Falls Timber Co.,** which involved a logger who had finished his recreation and was on the defendant's logging railroad going

back to camp—**the transportation being furnished by the employer**—when the accident occurred. We have no quarrel with this case nor with any of these cases which hold as the rule that when an employer provides transportation the compensation liability commences with the transportation.

The **Gabumas** case and the **Lewis** case are both unusual cases entirely apart from the case at bar which might best be summed up by what the New York Court of Appeals said in **Lewis:**

"* * * Here Lewis was sent by his employer to a country where there had been warfare for a long time and where an uneasy truce was in effect."

In fact, if **Larson** on **Workmen's Compensation** will be examined at Sec. 25.00 et seq. a number of traveling employee cases will be found with various and sundry **ratio decidendi.** Some of these New York cases might be considered to award compensation because of the "strange customs" and "abnormal conditions" of travel in a foreign land but it is obvious they have no light to shed on our case.

Petitioner suggests at page 7 of her Brief that "In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment."

That statement and citation of two Jones Act cases

dealing with maintenance and cure surprise us, as well as the suggestion that the Jones Act situations are "analogous". Maintenance and cure has certain limitations not applicable to Workmen's Compensation—as for example the fact that maintenance and cure is not paid throughout a "permanent and total disability"—and again maintenance and cure in itself is an old maritime doctrine.

For the suggestion to be made that situations are analogous that date back to the "Laws of Oleron" and the saga of the seas and the doctrine of seamen being wards, is demonstration of an **in extremis** argument.

Congress could have so provided but in fact Congress did not. The Federal Longshoremen's and Harbor Workers' Act is a complete and well thought out entity in and of itself providing for compensation under specific and particular conditions. The Federal Longshoremen's and Harbor Workers' Act was made applicable to defense bases and to the employment in the case at bar by the Defense Bases Compensation Act, 42 U.S.C. Sec. 1651 et seq. Had Congress wished a wider coverage to be given under the Act to employees at defense bases, had Congress considered, as the Petitioner would have this Court believe, that it "intended" a wider coverage, then of course Congress could have provided the wider coverage but Congress did not.

For example, Congress provided the wider coverage under the Federal Employees Compensation Act—5 U.S.C. Sec. 51 et seq.—by saying in 42 U.S.C. Sec. 1701 "and such injury proximately results from a war risk hazard, whether or not such person in actuality was engaged in the course of his employment". Congress again widened

the coverage in this very Defense Bases Compensation Act with respect to injuries received during transportation to and from the place of employment by saying in 42 U.S.C. Sec 1651(a)(4) that coverage "shall include any injury or death occurring to any such employee during the transportation to and from his place of employment, where the employer or the United States provides the transportation or the cost thereof".

The fact is therefore that Congress did not in its Defense Bases Compensation Act broaden the scope of the coverage of the Federal Longshoremen's and Harbor Workers' Act except in the one particular just above noted.

Petitioner then contends that the Fifth Circuit is in conflict with **O'Leary** because the Fifth Circuit said, inter alia, that no benefit to the employer had been shown.

If, however, the opinion of the Fifth Circuit will be read it will be found that the Court was saying that no matter how hard it looked it could not find any evidence to furnish a link "by which the activity in which Gondeck was engaged was related to his employment". The Court was not laying down a rule that there must be benefit to the employer; the Court was trying to find if there was any possible link between the employment and the injury.

Petitioner then argues that there is a presumption of coverage. Of course a presumption of coverage does not have the quality of independent affirmative evidence —see **John W. McGrath Corp. v. Hughes**, 264 F.2d 314 (C.A.2d 1959) and this is merely a makeweight.

We have no argument whatever with the espousal by the Petitioner of the doctrine of liberal interpretation of the Federal Longshoremen's and Harbor Workers' Compensation Act. We agree that that Act is to be liberally construed in favor of the employee. To go from the doctrine of liberal construction, however, to the abolition of there being a link between the employment and the injury is stretching the elasticity of interpretation beyond the breaking point.

POINT II

Under this head the Petitioner states that the "Deputy Commissioner properly rejected outmoded common law conceptions of scope of employment and held the decedent was injured within a zone of special danger".

Unfortunately for Petitioner's contention, there were no such findings by the Deputy. The Deputy did not say that he was rejecting outmoded common law conceptions nor did he hold that decedent was injured within a zone of special danger. The Deputy's opinion may be read from beginning to end without finding any such conclusion as this.

We agree of course that under the Federal Longshoremen's and Harbor Workers' Compensation Act a common law conception of scope of employment is not applicable. The requirement under the Act is that the injury must be one "arising out of and in the course of employment". The Fifth Circuit did not go off into what Petitioner says. What the Fifth Circuit did was to say that it could find no "link by which the activity in which Gondeck was engaged was related to his employment". That is no common

law conception but rather straightforward application of modern compensation law.

The assertion by the Petitioner that: "The doctrin of 'zone of special danger' has been discarded by the Fifth Circuit" is of a piece with the other stretchers made by Petitioner. There just wasn't any 'zone of special danger'.

POINT III

Under this head are the arguments previously made by the Petitioner with, however, the assertion that had Gondeck gone in to town by bus and hitched a ride back he would have been covered. That is not what the Fifth Circuit said nor is it correct. In addition, Petitioner makes the following statement which has no support whatever in any part of the Record and the source of which is a mystery to us: "The company rules permit employees to hitch back from town." We know of no rule, we know of no issue in connection with such an assertion, there is no such factor in this case.

POINT IV

Under this head the argument is made that the Deputy properly refused to penalize the Claimant for violation of a non-communicated unenforced company rule. This contention, repeated a number of times, is entirely beside the point in this case.

As was said in our Brief below, the District Court did not reverse the Deputy on the ground that the decedent was violating company regulations by using the jeep—and we have no quarrel with the rule stated by

the Petitioner that employees should not and must not be denied compensation for violation of uncommunicated unenforced company rules—and the fact is that we have said this repeatedly and over and over again—and the fact is that Petitioner continues to make the same argument over and over again.

What happened was that the District Judge stated that the recreational trip could hardly be said to be employer sponsored or employer approved or arising out of or in the course of employment when the jeep itself was not permitted to be so used. And that is as far as this matter went. It did not go to the point of denying compensation because of violation of company rules.

Nor did the Fifth Circuit do what Petitioner claims it did. All that the Fifth Circuit said was that it did not think it could be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base; and that if such sponsorship could be inferred, it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purpose. The West syllabi are proof enough of what the Court said as contrasted to what Petitioner says it said.

POINT V

When Petitioner under this head states:

> "Presumably, the Court of Appeals would have reinstated the compensation award except that

> it conceived that under the Act it had authority to reweigh the evidence. * * * "

this is another of the sheer gratuities paid to the Fifth Circuit by the Petitioner. The Court had no such idea. The Court did no such thing. The Court did not, as Petitioner claims it did, widen the scope of judicial review.

It is an odd turnabout as we have previously noted; and the facts were all stipulated; but more significantly what sense is there to a contention about reweighing evidence when Petitioner concedes that the facts in this case " . . . are adequately summarized by the Court of Appeals and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4)

CONCLUSION

Actually, due to the stipulated facts in this case, the question essentially was sheerly one of law and on that question the Fifth Circuit Court of Appeals properly ruled, under the stipulated facts, that the injury and death of Gondeck were wholly disassociated from his employment and that there was no evidence to furnish a link by which the activity in which the decedent was engaged was related to his employment. He was at the time engaged in a private — not employer sponsored and not employer aided — recreational trip of his own which was purely personal to him and the risks that he incurred were again purely personal to him and not arising out of the employment.

The issue in these cases is "Is the risk personal or employment related?" That is what was decided here, on stipulated facts. The Deputy's finding was not only unsupported by substantial evidence on the record considered as a whole but there was no evidence to support it. And, more significantly, the question, essentially, was one of law which again had only one answer.

We therefore respectfully submit that in this case there is no important, special, or substantial reason for certiorari.

We might observe that the only reported federal decision dealing with this specific situation is a District Court decision in **Brown-Pacific-Maxon, Inc. v. Pillsbury,** 132 F.S. 421 (D.C. Calif. S. D. 1953) in which virtually the same fact situation was held by the District Judge to result in non-compensability.

Respectfully submitted, this
_____day of May, 1962.

LEO M. ALPERT
1112 Biscayne Building
Miami 32, Florida
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed to Arthur Roth, Esq., 1111 Ainsley Building, Miami 32, Florida, and Norman Miller, Esq., 20 S. E. First Avenue, Miami 32, Florida, this _____ day of May, 1962.

LEO M. ALPERT
1112 Biscayne Building
Miami 32, Florida
Attorney for Respondents

APPENDIX

(This Stipulation of Facts may be found in the Transcript of Record at p. 7-13)

STIPULATION OF FACTS

1. Pan American World Airways, Inc., contracted with the United States Government to staff the non-military portions of certain of the United States Guided Missile Tracking Bases with civilian employees.

2. The deceased, FRANK J. GONDECK, a resident of Florida, was employed by Pan American World Airways, Inc., in March, 1958, to work on San Salvador Island, B.W.I., as a diesel generator operator. The terms of his employment required him to report to Patrick Air Force Base, near Cocoa, Florida, and be transported by air, at his employer's expense, to San Salvador Island, B.W.I., where he was to remain for forty-five (45) days. He was then to be returned to Patrick Air Force Base, at the expense of his employer, and receive a seven-day leave. Thereafter, he was again to report to Patrick Air Force Base, be transported to San Salvador Island to work another forty-five (45) days and receive another seven-day leave, as before. The same procedure was to be followed thereafter, except that the work periods were to be for three (3) months and the leave periods to be fourteen (14) days. His remuneration included a 30% bonus for working overseas, and periodic raises were contemplated in the future.

3. FRANK J. GONDECK'S duties were to operate the diesel engines generating electricity in the power-

house. He worked eight (8) hours, then was off twenty-four (24) hours, but was subject to call in the event of an emergency. His salary was $513.00 a month, which included a 30% overseas bonus.

4. The employer furnished transportation from and to Patrick Air Force Base, housing facilities, board and laundry, and transportation on the Island.

5. Such transportation as might be needed on the Island was supplied by a Pan American motor bus operated by a Pan American bus driver on a regular schedule from the Base to the town, at no charge.

6. The housing facilities consisted of a room in a dormitory, each room being occupied by four men, the dormitory being approximately 100 feet long and facing the Atlantic Ocean, as shown on the sketch attached hereto as Exhibit "A", the dormitories being marked "5" on the Exhibit.

7. At the Base there was also a recreation center for the employees known as the "Reef Club". (On Exhibit "A", this is labeled the "Subsistence Building").

8. The town is Cockburn Town, which has native clubs in a section known as Victoria Hills, where PAA men were commonly known to go for beer. One of the native clubs is the "Blue Marlin Club". Cockburn Town is predominantly Negro, there being very few White people on San Salvador.

9. Pan American, for the use of powerhouse employees in going back and forth to some of the more re-

mote diesel operations (the powerhouse on the Base is only one of several diesel operated electric generating plants), has one jeep. The use of this jeep for personal missions by employees is forbidden by Pan American. The jeep in question was assigned to the powerhouse and was checked out to Mr. E. Wells, powerhouse superviser, on a daily basis.

10. The powerhouse superviser, Mr. E. Wells, some three or four days prior to April 24, 1958, had warned Smith and Norman, two of the powerhouse employees, that the powerhouse jeep was not to be used for anything except official business.

11. On April 24, 1958, FRANK J. GONDECK reported for work as usual at 0800, worked his regular eight-hour shift, and went off duty at 1600 hours. He, together with some other employees, went to the "Reef Club", and there about eight or nine of the civilian employees sat around drinking champagne. The employees drinking were, specifically, Fox F. Fry, Frank Gondeck, James F. Norman, and R. M. Smith. The Superviser, Wells, was asked by Fry to join them and have a glass of champagne, which he did. Wells then went to the mess hall, had dinner, then went to his quarters and cleaned up. About 1730 hours he started to a movie on the Base and stopped by the "Reef Club" to have a beer. At that time, the same men were there sitting at the same tables drinking. Wells had a beer and then started for the movie. He went to the movie but did not stay long, left the movie and returned to his quarters. He was in his quarters when informed about the wreck. If produced as a witness, he would further state that he did not know that the men

were going to use the jeep and that no permission had been given to them to use the jeep.

12. James F. Norman, civilian powerhouse operator, if produced as a witness, would testify as follows:

> "On 24 April 1958, I used the powerhouse jeep, and accompanied by Fry, Smith, and Gondeck, other powerhouse operator, proceeded to a native village about three miles from the Base. We stopped at a local beer place and ordered one beer. We spent about fifteen minutes at this beer place. At this time we proceeded toward San Salvador AFB. The native at the beer place asked us for a ride (I do not know his name). The native said that he worked at the Base. He then got into the jeep. As we approached the Base, I believe the wheels hit a hole in the road and caused the wheel to jerk to the left. I then jerked them to the right and this caused the jeep to skid, and I was thrown out of the jeep. I judge the speed of the jeep was about 30 miles per hour. The jeep is checked out permanently to the powerhouse and it is used by the personnel of the powerhouse to change watches at the three different powerhouses. The jeep was being used at the time of the accident for personal use. Before leaving the Base, we had been drinking, but not to excess. I am familiar with instructions that natives are not allowed to ride in PAA vehicles if they are not employed at the Base. After Smith verified the native's being employed at the Base, he was allowed to ride in the jeep. I cannot explain what

caused the jeep to go into the skid, as it happened so fast and I know the front end of the jeep has been bad for a long time. The Base maintenance section knows the jeep had a bad front end."

13. Fox F. Fry, civilian powerhouse operator, if produced as a witness, would testify as follows:

"I was involved in an accident with a ¼ ton jeep near the entrance to the Base. I was at the Base Club at about 1700 hours, had a beer, went to the mess hall, had chow, and talked with other powerhouse operators until time for the mess hall to be closed. I then went back into the Club where I had some more beer, continued talking to the others. Meanwhile, we left the Club, continued talking, and proceeded to the main powerhouse. About 1930 hours, Smith, Gondeck, myself, and Norman, driving, took the PAA ¼ ton jeep assigned to the powerhouse, proceeded to a native village located about three miles from the Base. We spent about fifteen minutes having a beer at a native beer place. We left the beer place to return to the Base. The native (I do not know his name) came out of the beer place with Smith and loaded into the jeep. After leaving the beer place with Norman driving, we proceeded toward the Base, at a rate of about 30 or 35 miles per hour. Just before reaching the entrance gate, the jeep seemed to go to the left and then skid to the right. I remember the chrome from the jeep being thrown from the jeep. I got up in a daze and walked to the

powerhouse and informed the operator of the accident. Then I passed out. I have no knowledge of the reason the native was riding in the jeep. All of the U. S. occupants of the jeep had been drinking, but not to excess."

14. Attached is a sketch, Exhibit "B", showing where the vehicle overturned. PAA Investigator, L. E. Bail, if produced as a witness, would testify that he examined the road at the scene of the accident on April 28, 1958, after ascertaining that there had been no changes in the highway since the accident of April 24th, and found that the vehicle was traveling Southwest and when at a point 147 feet Northeast of the gate, the vehicle went into a skid which lasted for 82 feet, 9 inches, to the point of overturn; the skid marks and dragging after the overturn indicated that the vehicle turned over one and one-half times and came to rest on its left side, 65 feet from the point of the original overturn; the physical evidence indicated continuous acceleration while the jeep was in the skid.

15. The accident occurred at approximately 2005 hours. R. M. Smith was dead when help arrived at the scene. Gondeck, Norman, Fry, and the native, R. Lightbourne, were flown from the Base for medical attention; Lightbourne to Nassau, Bahamas, and Gondeck and the others first to Patrick Air Force Base, then to Orlando, Florida, where, on April 27, 1958, Gondeck died of the injuries he had suffered in the overturn, as per a certified copy of the Death Certificate attached hereto as Exhibit "C".

16. At the time of his death, Gondeck left surviving

and dependent upon him a widow, Jeanette E. Gondeck, and a daughter, Barbara Ann Gondeck. The daughter's birthdate is August 29, 1940.

Respectfully submitted,

(Sgd.) Leo M. Alpert
LEO M. ALPERT
Attorney for Employer
and Carrier,
Pan American World Airways, Inc., and Travelers Insurance Company
1112 Biscayne Building
Miami 32, Florida

(Sgd.) Thomas G. Spicer
THOMAS G. SPICER
Attorney for Claimant,
Mrs. Jeanette E. Gondeck
819 Seybold Building
Miami 32, Florida

COPY

JUL 5 1962

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

PETITION FOR REHEARING

NORMAN MILLER
20 S. E. 1st Avenue
Miami 32, Florida

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

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THE OPINION BELOW

The opinion below is now reported at 299 F.2d 74.

STATEMENT

Comes now the Petitioner JEANETTE GONDECK, pursuant to Rule 58(2), of the Supreme Court Rules, and moves the Court to grant a rehearing on the Petition for certiorari to the United States Court of Appeals for the Fifth Circuit, which was denied on June 11, 1962, and for grounds therefore would show unto the Court:

1. That there have occurred intervening circumstances of substantial and controlling effect — the award of compensation benefits to the widow and children of a passenger in the jeep, who was killed at the same time as FRANK GONDECK.

2. That there are other substantial grounds for review not presented in the petition — the prayer that the cause be returned to the Deputy Commissioner for further evidence and findings to complete the record.

REASONS FOR GRANTING REHEARING

I

Where Two Forums Consider the Same Case and Reach Different Results, the Only Way To Resolve the Conflict Is By Review in the Court

The Decedent was killed on San Salvador Island while employed at the United States Air Force Base as a civilian employee, while returning to the base as a passenger in a company jeep. Another passenger in the jeep was Robert M. Smith.

Smith's widow made a claim for compensation in the Fifth Compensation District pursuant to the Defense Bases Act., 42 U.S.C.A., § 1651, et.seq. The Deputy Commissioner entered an award of benefits under the Act to Mrs. Smith and her children. On review to the United States District Court for the Eastern District of Virginia, Civil Action No. 3136, the District Judge, by order of

March 15, 1961, remanded the cause for further findings. The opinions are not reported.

On April 5, 1962, the Deputy Commissioner entered a supplemental compensation order with additional findings, and renewed the award of compensation. The supplemental compensation order of the Fifth Compensation District of April 5, 1962, is set out in full in the appendix attached hereto.

With the case back in the Eastern District of Virginia, the deputy commissioner moved for summary judgment on June 25, 1962; that is the posture of the Smith case as this petition is filed.

Consequently, on the facts, we are faced with the anomalous situation where two workers have been killed in the same accident and the widow and children of one will receive compensation, and the widow and the child of the other will not.

The stipulation of facts in the cause at bar (TR. 7-13), (Respondent's Appendix 1-7) are materially at variance with the findings of fact of the Smith case. The findings of fact in both cases should be the same. The facts are the same.

Consequently, we have two forums reviewing the very same case and arriving at different results. This is a classic case for granting certiorari on rehearing. **Sanitary Refrigerator Co. v. Winters,** 280 U.S. 30, 34 (1929).

II

There Would Seem To Be a Conflict In Circuits On the Procedure for Remanding Compensation Orders For Additional Findings

The Petitioner requested the court below to remand the cause for additional findings by the deputy commissioner for completion of the record. The court refused to grant this relief.

The District Judge in the Smith case held that the record was incomplete and ordered new hearings and findings by the deputy commissioner. He was apparently following the practice of the Fourth Circuit.

The Sixth Circuit has assumed the authority that it may, sua sponte, remand a case under the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C.A. § 901, et seq., for completion of the record by taking additional testimony and making new findings. **Dixie Sand & Gravel Corp. v. Holland,** 255 F. 2d 304 (6th Cir. 1958). Other circuits follow this procedure. **Ng. Yip Yee v. Barber,** 267 F.2d 206 (9th Cir. 1959); **Monrote v. Britton,** 237 F.2d 756 (D.C. Cir. 1956); **Vendemia v. Cristaldi,** 221 F.2d 103 (D.C. Cir. 1955); **Morand Bros. Beverage Co. v. NLRB,** 190 F.2d 576 (7th Cir. 1951); **American Broadcasting Co. v. Federal Communication Commission,** 179 F.2d 437 (D.C. Cir. 1948); **Ocean S.S. Co. of Savannah v. Lawson,** 68 F.2d 55 (5th Cir. 1933).

The Gondeck case was submitted on stipulated facts. All the pertinent facts were in the control of the employer. Mrs. Gondeck's attorney relied on the integrity

of the employer in reporting the pertinent facts. However, on a full investigation with testimony taken, and documentary evidence submitted the deputy commissioner in the Smith case found several material variances between the evidence in both cases. For instance, the deputy in the Smith case found that no bus service was provided between the base and town; that use of the jeep was not forbidden; that the road on which the accident occurred was built and maintained by the employer. It would seem that the deputy commissioner should be permitted to conduct further hearings to resolve these material conflicts.

The authority for remand to the Deputy Commissioner for further evidence and findings is an integral part of both Acts, the Administrative Procedure Act, Title 5 U.S.C.A., Sec. 1009, The Longshoremen's and Harborworkers' Compensation Act, Title 33 U.S.C.A., Sections 918, 921.

CONCLUSION

It is respectfully submitted that rehearing be granted and the cause reviewed for remand to the deputy commissioner for further evidence and findings.

NORMAN MILLER
20 S. E. 1st Avenue
Miami 32, Florida

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay in the final determination of the cause. I further certify that the Petition is restricted to the grounds set forth, the intervention of circumstances of substantial and controlling effect, and other substantial grounds not previously presented.

Norman Miller

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon on this_____day of June, 1962.

Norman Miller

APPENDIX

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FIFTH COMPENSATION DISTRICT

SUPPLEMENTAL COMPENSATION ORDER

CASE NO. DB-C-773-376

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Dorothy A. Smith, widow of
Robert M. Smith, deceased employee,

Claimant.

v.

Pan-American World Airways, Inc.,

Employer.

Travelers Insurance Co.,

Insurance Carrier.

A compensation order was filed in the above entitled case on 22 December 1959 by the Deputy Commissioner, in which the Deputy Commissioner awarded compensation to Dorothy A. Smith, widow, and Robert Monroe Smith and Dennis Andrew Smith, minor children of Robert M. Smith, deceased employee.

On 21 January 1960 the employer and insurance carrier above named instituted a proceeding for judicial review of said compensation order in the United States District Court for the Eastern District of Virginia, Norfolk Division, Civil Action No. 3136.

On 15 March 1961 the Court entered an order remanding the case to the Deputy Commissioner for further findings of fact with reference to the question of whether or not the death of Robert Smith arose out of and in the course of his employment.

Such further investigation in respect to the question of whether or not the death of Robert Smith arose out of and in the course of his employment having been made as is considered necessary, and a further hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

SUPPLEMENTARY FINDINGS OF FACT

That the deceased herein at the time of his injury and death was on a temporary duty assignment for the employer on the Island of San Salvador; that the contract of hire was for 45 days; that San Salvador, W. I., is an island with maximum dimensions of 13 miles by 5 miles and comprising 42 square miles, with a native population of about 800; that the employer's installations were in various parts of the island, so that the entire island was practically the work site; that the contract of hire required the employer to furnish transportation from the point of hire to the down range bases where the work was to be performed, and on completion of the contract to return the employee to the point of hire, Miami, Florida, for a

7-day paid vacation; that if both parties were in agreement, the contract was renewable for another 45 days, at the same or another down range base, and thereafter for 3-month periods, with 14-day leave periods; that by the terms of the employment they agreed to furnish the employee at the work site with room, board, recreation and transportation, etc.; that on 24 April 1958 the deceased herein having completed his regular work assignment for the day, but on call in case of need, left the employer's camp with three fellow employees in an employer's jeep, operated by one of the fellow employees, to visit Cockburn Town about three miles away; that before starting back to the camp the party stopped at a native tavern, a place where employees of the employer were commonly known to stop for a beer; that on the return trip to the camp, within one-half hour of their departure, and on a road maintained by the employer, near the main gate of the camp the jeep went out of control of the driver into a skid and turned over, causing the injury and death of the deceased employee herein; that the use of employer's vehicles was authorized on application to the recreation officer; that the recreation officer did not issue a trip ticket or other paper in writing when authorizing the use of a vehicle for recreation purposes; that there was no prohibition against an employee riding as a passenger in a vehicle of the employer; that the employer did not maintain any other transportation between the town and camp for the employees; that the exigencies of the employment required him to remain on the island; that the work site being a small island, the employee could not escape the work environment; that at the time of his injury and death the deceased herein was engaged in an activity which, under the circumstances, was incidental to his employment; that the compensation

order filed on 22 December 1959 is made a part of this order by reference.

Given under my name at Norfolk, Virginia, this 5th day of April 1962.

STEPHEN O'HEARNE
Stephen O'Hearne
Deputy Commissioner
Fifth Compensation District

JUL 18 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR REHEARING AND PROPOSED SUPPLEMENT TO PETITION FOR REHEARING MOTION TO SUPPLEMENT PETITION FOR REHEARING

NORMAN MILLER
20 S. E. 1st Avenue
Miami 32, Florida

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

Supreme Court of the United States

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vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

MOTION TO SUPPLEMENT PETITION FOR REHEARING

Comes now the Petitioner JEANETTE GONDECK, and moves the Court for leave to file a supplement to her petition for rehearing, and attaches hereto her proposed supplement, and further prays that the proposed supplement be adopted, if the motion is granted, without the need to file it anew.

In support of this motion, the petitioner would show unto the Court:

1. The petition for writ of certiorari to the United

States Court of Appeals for the Fifth Circuit was denied on June 11, 1962.

2. The petition for rehearing was served by mail on July 3, 1962.

3. The United States Court of Appeals for the Ninth Circuit rendered its opinion on June 29, 1962, in **Self vs. Hanson, Deputy Commissioner, et. al.,** No. 16,928 (unreported), which was received by petitioner's attorneys on July 9, 1962, which opinion petitioner wants to bring to the attention of the Court as a substantial basis for granting rehearing. The opinion of Ninth Circuit is set out in full in the appendix attached hereto.

Wherefore, the Petitioner prays that the motion to supplement the petition for rehearing be granted, and that the proposed supplement be adopted without the need to file it anew.

NORMAN MILLER
20 S. E. 1st Avenue
Miami 32, Florida

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida

PROPOSED SUPPLEMENT TO PETITION FOR REHEARING

The Petitioner JEANETTE GONDECK has filed a

petition for rehearing on her petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, which was denied on June 11, 1962. The petition for rehearing was served on July 3, 1962. She hereby submits a supplement to her petition for rehearing.

Where subsequent to the denial of a petition for certiorari by this Court, another Court of Appeals renders a conflicting opinion to that presented for review, it represents an intervening circumstance of substantial and controlling affect as grounds for rehearing under Rule 58(2).

On June 29, 1962, the United States Court of Appeals for the Ninth Circuit rendered its opinion in **Self vs. Hanson, Deputy Commissioner, et. al.**, No. 16,928 (unreported), which would seem to be in direct conflict with the opinion herein by the Fifth Circuit, (now reported at 299 F.2d 74.) The Ninth Circuit opinion in the **Self** case is set out in full in the appendix attached hereto.

It would appear that the opinions of the Fifth Circuit herein, and the Ninth Circuit are in direct conflict, and that only this Court, pursuant to Rule 19(1)(b) can resolve this contemporaneous conflict of circuits.

We respectfully note to the Court that the Ninth Circuit holds that unsupervised recreation, even if it were a detour for a meretricious purpose, would be within the scope of employment because of the very nature of civilian working conditions at an off-shore defense base.

The circuits each assumes an entirely different phil-

osophical approach to the application of the Act, for injuries sustained during periods of recreation, the Fifth Circuit having adopted a narrow, common law interpretation of scope of employment, whereas the Ninth Circuit holds it should be construed in favor of the workman under a liberal approach.

It is respectfully submitted that this contemporaneous conflict of circuits is such that rehearing should be granted and the causes reviewed for resolution and settling of the interpretation of scope of employment during recreation under The Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C.A., §901, et. seq., and The Defense Bases Act, Title 42 U.S.C.A., 1651, et. seq.

NORMAN MILLER
20 S. E. 1st Avenue
Miami 32, Florida

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida

CERTIFICATE OF GOOD FAITH

I hereby certify that this supplement to the Petition for Rehearing is filed in good faith, and not for the purpose of delay, and is restricted to the grounds set forth, the rendering of a conflicting opinion by another court of appeals, on the same point of law.

NORMAN MILLER

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing Motion and Proposed Supplement were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents, to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D. C., by depositing the same in the United States Post Office with first class postage prepaid thereon on this _____day of July, 1962.

NORMAN MILLER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,928

June 29, 1962

ALTHEA G. SELF, formerly Althea G. Williams,

Appellant,

vs.

C. F. HANSON, Deputy Commissioner, Thirteenth Compensation District; MORRISON-KNUDSEN CO., INC., a corporation; PETER KIEWIT SONS, INC., a corporation; and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

---

Before: CHAMBERS, JERTBERG and KOELSCH, Circuit Judges

CHAMBERS, Circuit Judge:

There is a shore line highway on the Island of Guam which runs westerly about three miles from Agana to a

place called Schroeder Junction, thence on to a finger-like peninsula called Cabras Island, thence the length of Cabras Island (two miles), continuing on top of Crystal Breakwater for its three-mile length, and finally terminating in a turn-around area at the west or seaward end of the breakwater.

About 11:00 p.m. March 3, 1949, Althea G. Williams (now Self) and Alexander C. Muzzy were sitting in a cab of a small truck parked in the turn-around area. They had been there some twenty or thirty minutes when an army weapons carrier from nearby Harmon Air Force Base, running out of the control of its driver (one Corporal Seabourn), crashed into the right side of the cab of the truck at a point on the right door against which Mrs. Self was sitting. She suffered considerable spinal injuries, the permanence and seriousness of which remain disputed.

In attempting to fix liability on the United States under the Federal Tort Claims Act, Mrs. Self has twice before placed her case before this court, Williams v. United States, 215 F.2d 800, reversed 348 U.S. 926; Williams v. United States, 248 F.2d 492, certiorari denied 355 U.S. 953, but we ultimately held the United States insulated from such liability by virtue of Corporal Seabourn's unauthorized use of the weapons carrier.

Now, in the posture of a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act,[1] we are, for the third time, confronted with ques-

[1]The claim was made under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. §901, et seq., as extended by the Defense Base Act of 1941, 55 Stat. 622, 42 U.S.C. 1651-1654.

tions of authorized use and scope of employment—but this time with respect to Mrs. Self and her employers Morrison-Knudsen Co., Inc., and Peter Kiewit Sons, Inc., not to Corporal Seabourn and his employer, the United States. We now conclude that Mrs. Self should recover.[2]

To summarize this conclusion, it is our view that both Muzzy's and Mrs. Self's conduct was, at that time and place and in that vehicle, within the scope of their employers' authorization to such extent that, had they been the cause, not the victims, of the negligent driving, their employers would have been liable to injured third parties for their acts. We think the same rule applies to this compensation case.

Now, some more facts: In November, 1948, Mrs. Self, then 26 years of age and (we take it) unmarried, lived in Palo Alto, California. The Morrison-Knudsen and Peter Kiewit Companies (herein "MK-PK," as they were known on the island) had a joint construction contract to be performed in Guam. At Sausalito, about 40 miles from Palo Alto, they were recruiting stateside men and women to go to Guam to work for them. Mrs. Self, an experienced stenographer and clerk, became one of these people, entering into a written employment contract whose terms consumed some 28 pages of ordinary typing or 2 pages of fine print. Mrs. Self was employed as a stenographer, and she was obligated to stay in Guam at least a year, although MK-PK were not required to keep her that long. For their part, MK-PK agreed to pay her a starting salary of $48 a week, to provide her room and board at $1.50 per

[2]The claim was rejected by the Deputy Commissioner of Labor, and on reveiw the United States District Court for the Northern District of California sustained the commissioner.

day, and to transport her on the round-trip from Sausalito to Guam, although the "homeward" leg of the journey was conditioned on her performing the contract.

On arrival in Guam she was given quarters in the women's compound at Edusa along with about 150 or 200 other women. The regular meals were at a nearby mess hall. Also, her work for eight hours a day (and usually overtime on Saturday) was performed at a nearby building in which MK-PK had space. About a week before the accident she had advanced from stenographer to Muzzy's secretary. Her salary, including overtime pay, had increased to about $68 a week. In the testimony Muzzy is described as "part of the MK-PK 'brass' on the job." His title was Superintendent of Supply Yards and Docks. Normally he worked eight hours a day, but was on 24-hour call.

The Edusa headquarters seems to have been ten to twelve miles northeast of Agana, and somewhere in between was the Harmon Air Force Base. Some weeks before the accident Mrs. Self had sought and obtained from MK-PK permission to teach evenings in a school for adults located across the road from the air base. Apparently it was sponsored by the 20th Air Force for air force and military personnel, their families, and civil service workers. Mrs. Self taught there four hours a night, four nights a week, from 6:00 p.m. to 10:00 p.m., at a salary of a dollar an hour.

There was no public transportation system available in the Edusa-Harmon area. One had to depend on rides either in government cars of military personnel or MK-PK cars and light trucks. Both seem to have been plenti-

ful. (Apparently the army engineers and MK-PK used the same motor pool area at Edusa for their motor vehicles.) Muzzy had a permanent trip ticket. In writing, he was authorized to use the vehicles for recreational purposes without limit except to the island. (Of course, the agreement provided he was responsible for negligent damage to the vehicle and its loss.) And it seems apparent that MK-PK was maintaining the car and, we assume, furnishing the gasoline.[3] Mrs. Self had taken and passed the quartermaster examination for a government "driving license," which apparently was required by MK-PK and the Engineers, who supplied the cars to MK-PK. She was authorized to drive passenger cars, station wagons and small trucks. She testified, and it seems uncontradicted that she was authorized to draw a car, a trip at a time, for the same recreational purposes. However, there is no record of her drawing a car. Women, especially at night, were not encouraged to drive the cars.

The MK-PK vehicles were used regularly by employees to get to and from the Edusa school, all with the approval of MK-PK, and apparently as a fringe benefit to employees. It is apparent if you were an MK-PK employee you didn't take your car to Guam or buy one.

Mrs. Self had been accustomed to travel to and from the school with a Mr. and Mrs. Wenk, employees of MK-PK, in an MK-PK car, all of which was authorized. On the night of March 3, 1949, the Wenks were to return

[3]Mrs. Self testified, "MK-PK provided you with your transportation to anywhere [on the Island] and back." While the hearing officer could have disbelieved this, it is suggested that it should be accepted as true. No effort, except as to the extent of her injury, was made to contradict any of her testimony. Most of it, if untrue, was readily capable of disproof. If MK-PK provided one transportation anywhere, it is fair to assume they bought the gasoline.

at 8:00 p.m. to Edusa, and Mrs. Self had to teach until 10:00 p.m. Under the circumstances, aware of the situation, Muzzy had agreed to pick up his new secretary at the school and take her back to Edusa. If it was a personal attraction to Mrs. Self that prompted him to do so, he was nonetheless about a half hour late. Mrs. Self had to wait for him at the nearby post exchange.

Upon arrival at the post exchange, Muzzy informed Mrs. Self that he had to drive, not northeast, but west to the Builders' Club to make arrangements for a surprise party for the controller of the joint operation of MK-PK, who was about to leave, either permanently or temporarily. The club was west of Agana. To reach it one made a left turn off the shore line highway at Schroeder Junction and drove inland about a mile and a half. But Muzzy didn't make the left hand turn. He kept straight on the shore line highway, out over Cabras Island and on to the extreme westerly (or turn-around) point on the breakwater. There the two parked in the car. They say they went to take a look at a new Japanese ship in the harbor Muzzy wanted to see or show to Mrs. Self.

There has been some cynicism about the parking. Government counsel argues that Muzzy and Mrs. Self could not possibly have been looking at the ship because there were intervening high rocks that would have obstructed their view of the ship. But this may not be true. The view would depend on where the truck was parked, and the truck was only approximately located by the witnesses as to its position in the area.

But whether it was the ship they detoured to see en

route to the Builders' Club or the attraction of each other that carried them there, we hold there was coverage.

Here was a situation where one really had no life but the company's life. Employees were restricted to a most limited portion of the island which itself provided narrow limits of confinement: its area of 206 square miles was covered by very few roads. And the effect of Guam's remoteness from other civilization—particularly Sausalito (or Palo Alto) and the mainland for Mrs. Self was emphasized by stringent company regulations regarding departure from the island.

In these circumstances, it is not surprising that MK-PK had to provide inducement for its recruits by providing for their recreation. This they chose to do by sponsoring organized trips and projects and cars for unsupervised recreation. And in these circumstances, it is not surprising to find employees at the end of Crystal Breakwater, where Mrs. Self and Muzzy parked, for this area was patrolled by a military sentry and was one of the very few points on the island's roads where MK-PK employees were authorized to go for recreation.

No doubt if Muzzy had been injured his case would have been somewhat stronger than Mrs. Self's. But we think in the peculiar circumstances here it was company business for him to go to Harmon and take her home to Edusa. It was company business for her to go back to company quarters from school. Further, although the road travelled was the long way around and it may have been for recreation, still we hold it within the scope of the employment.

We do not think the case is to be tested by the conventional mainland case where the truck driver departs from his authorized route for his private personal convenience. And we do think this is a case where scope of employment should be construed in favor of the workman and requires the same liberal approach indicated in Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 P. 629. Of course, that case varies as to the nature of the claim, and there are many fact differences.

While we do not regard this as an ad hoc, one trip decision, we do regard it as one of limited application in a situation where a recreational void had to be filled by the company. Obviously, recreation was considered a necessity for MK-PK employees in Guam, the more so because of the restricting conditions mentioned above (and see our second Williams opinion, supra), and the companies affirmatively provided the method and the means, supervised and unsupervised, including the maintaining of cars which were made available to employees under circumstances amounting to more than mere bailments. Further, as we have indicated, the places where the employees could go were designated.

And so we have concluded that Mrs. Self's injury was one "arising out of and in the course of employment" within the Longshoremen's Act, supra. Our conclusion is not a novel one, having been, we feel presaged by our second Williams decision, supra. And this court reached a similar result in the earlier, analogous, case of Hastorf-Nettles, Inc. v. Pillsbury, 9 Cir., 203 F.2d 641. There, an employee of a subcontractor on an Alaska military base construction job was faced with restricting conditions like those facing Mrs. Self here: there was a dearth of

transportation and recreation facilities at the isolated construction site, and it became the custom of the prime contractor's vehicle drivers to give rides to all employees, including those of subcontractors. The employee in that case has been recreating in a town some forty miles from the construction site, to which he had planned to return by train (he already had his ticket), but he was offered a return ride by a prime contractor's truck driver, which he accepted. The injury which he received on the drive back we found to have occurred "in the course of employment" under the same provisions of the Longshoremen's Act.[4]

We consider our decision consistent with the liberal purpose of the act.

Judgment reversed for proceedings consistent with this opinion.

(Endorsed) Opinion Filed June 29, 1962.
Frank H. Schmid, Clerk.

---

[4]In considering cases applicable to Mrs. Self, it is necessary to run across a broken field. This court, in arriving at its conclusion within set forth, is greatly influenced by its reading of the following cases: The second Williams case, supra; Hastorf-Nettles, Inc v. Pillsbury, supra; Boynton v. McKales, 139 Cal. App. 2d 777, 294 P. 2d 722; Shell Oil v. Industrial Accident Commission, 199 A.C.A. 457, 18 Cal. Rptr. 540; Cox v. Enloe, 50 Ariz. 201, 70 P. 2d 331; Strauss v. Industrial Accident Commission, 73 Ariz. 285, 240 P. 2d 550; Employers Mut. Liability Ins. Co. v. Konvicka, 5 Cir., 197 F.2d 691; Henry v. Lit Brothers, 193 Pa. Super. 543, 165 Atl. 2d 406; Reinert v. Industrial Accident Commission, 46 Cal. 2d 349, 294 P. 2d 713; Babcock v. Tam, 9 Cir., 156 F.2d 116; Winter v. Industrial Accident Commission, 129 Cal. App. 2d 174, 276 P. 2d 689.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

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JEANETTE E. GONDECK, Intervenor,

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vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

The Petitioner JEANETTE B. GONDECK respectfully moves the Court for leave to file herein an extraordinary petition for rehearing on her petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision affirming the judgment of the United States District Court for the Southern District of Florida, which set aside an award of compensation for death under the Defense Bases Act, Title 42 U.S.C. 1651.

The Petitioner moves the Court to waive the provisions of Rule 58(4) of this Court's Revised Rules, and to apply herein the rule established in **United States v. Ohio Power Co.,** 353 U.S. 98 (1957).

For reasons for granting this extraordinary relief, Petitioner represents to the Court that there has just been determined in this Court three cases involving the same points, all holding differently from the holdings in this case:

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., (Ecker's case), 327 F.2d 1003 (5th Cir. 1964), certiorari granted, cause placed on summary calendar and reversed, per curiam, No. 307, March 29, 1965, 33 L. Week 3317, Opinion at 33 L. Week 3320.

Pan American World Airways, Inc. v. O'Hearne, (Smith's case) 335 F.2d 70 (4th Cir. 1964), cert. denied, No. 474, March 29, 1965, 33 L. Week 3322. (Awarding benefits to the widow and children of a worker killed in the same accident as Frank Gondeck).

O'Keeffe v. Pan American World Airways, Inc., (Rose's case) 338 F.2d 319 (5th Cir. 1964), cert. denied, No. 852, March 29, 1965, 33 L. Week 3322.

The Petitioner attaches hereto her proposed petition for rehearing.

ARTHUR ROTH, ESQ.
Attorney for Petitioner
1111 Ainsley Bldg.
Miami, Florida 33132

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon on this____day of April, 1965.

ARTHUR ROTH

FILED
JUN 16 1965
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS,
INCORPORATED and
THE TRAVELERS INSURANCE COMPANY,
Respondents,

RESPONSE TO EXTRAORDINARY PETITION FOR RE-HEARING

LEO M. ALPERT
1112 Biscayne Building
Miami, Florida 33130

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1. Time has made so many changes, irreversible in Gondeck, that time and finality require a denial of the extraordinary petition for re-hearing. 22

2. Justice to the Employer and Carrier, their counsel and representatives require the doctrine of finality to be applied. 22

3. If the rule of Gondeck is sought to be reversed it should be reversed prospectively and not retrospectively. 22

4. The rule in Gondeck is sound as applied to the facts in Gondeck. 22

5. The distinctions between Ecker and Gondeck, the working by the employee in Ecker on a 365 day per year basis, which

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was not true in Gondeck, the injury "on a work day, so to speak, and in a manner not prohibited by the Employer," which was not true in Gondeck, makes the one case not in conflict with the other. 22

6. The legal issue in Ecker and the legal issue in Gondeck are not the same. 23

7. The distinctions between Rose and Gondeck are so obvious as to require no extended discussion. 23

8. The difference in record between Smith and Gondeck justify, if such be, the difference in judgment. 23

9. The basic legal principle, in Ecker, however, although not in conflict with Gondeck, is an erroneous legal principle pressed upon the Court without due and proper analysis, research and thought. 23

10. The basic question in Ecker is a question of law—that of reasonable recreation—and not one of fact. 23

11. The doctrine of reasonable recreation is a doctrine not provided by Congress but invented by deputy commissioners. 23

12. Oral Argument should be granted in this case and in Ecker if the Extraordinary Petition for Re-Hearing is to be granted. 23

CERTIFICATE OF SERVICE 24

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

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PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents,

RESPONSE TO EXTRAORDINARY PETITION FOR RE-HEARING

I

FINALITY, RETROSPECTION OR RETROSPECTIVITY

A

The Irreversibility of Time and Finality.

1.

This Brief is being written in June 1965.

In June 1962 Petition for Certiorari was denied (See Order of June 11, 1962.)

In October 1962 Petition for Re-Hearing was denied (See Order of October 8, 1962.)

But now, three years after June of 1962, because of an "Extraordinary Petition for Re-Hearing" we are re-considering, reviewing, re-weighing a lawsuit decided and closed three years earlier.

The closing of this case three years ago resulted in irreversible action on the part of many people, as well as the irreversible effects of time itself.

In this case the Employer Pan American World Airways and the Compensation Insurer completed and closed their premium arrangements. The various personnel completed and destroyed (or stored) various files. Counsel removed and selectively arranged his file. Counsel billed and was paid on the basis of, inter alia, the result accomplished. (See the A.B.A. Canons of Ethics, Rule 12.)

The delicate, arduous and at times inspirational and intuitive task of the lawyer in assembling the facts, studying and weighing the factors, reflectively considering the principles, determining the presentation, was completed.

All these factors are irreversible.

2.

When this Court issued its Mandate on October 8, 1962, then, contrary to what Petitioner at one point mentions but forbears to press because of its obvious unsoundness, this cause became a closed case.

Petitioner is not only unsound on this but also estopped, we suggest, because Petitioner moved to dismiss her appellate bond and close this case in December 1963—per copy of said Motion herewith:

MOTION TO DISMISS BOND

PAN AMERICAN WORLD AIRWAYS, INC., and THE TRAVELERS INSURANCE COMPANY,

Plaintiffs,

vs.

WILLIAM O'KEEFFE, Deputy Commissioner, Sixth Compensation District,

Defendant.

and

JEANETTE E. GONDECK,

Intervenor.

COMES NOW the Defendant JEANETTE E. GONDECK, and moves the Court for an order discharging her and her surety, NATIONAL SURETY CORPORATION, and their appellate bond posted herein, nunc pro tunc November 1, 1961, and represents that the Supreme Court

denied her petition for rehearing of its order denying her petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit, and that the Plaintiff has not filed any bill of appellate costs, nor has the Plaintiff incurred any taxable appellate costs.

ARTHUR ROTH, ESQ.
Attorney for JEANETTE E. GONDECK
1111 Ainsley Building
Miami, Florida 33132

and then requested and obtained a Stipulation and Order discharging her—per copy herewith:

STIPULATION AND ORDER

PAN AMERICAN WORLD AIRWAYS, INC.,
and THE TRAVELERS INSURANCE CO.,
Plaintiffs,

vs.

WILLIAM O'KEEFFE, Deputy Commissioner,
Sixth Compensation District,
Defendant,

and

JEANETTE E. GONDECK,
Intervenor

It is hereby stipulated and agreed that the cost bond in the amount of TWO HUNDRED FIFTY and 00/100 ($250.00) DOLLARS, posted on appeal by the Intervenor JEANETTE E. GONDECK, and her surety NATIONAL SURETY

CORPORATION, may be cancelled and the parties discharged of their Liability thereunder, as of October 8, 1962.

ARTHUR ROTH, ESQ.
1111 Ainsley Building
Miami 32, Florida
Attorney for Intervenor
/s/ Arthur Roth

LEO M. ALPERT, ESQ.
1112 Biscayne Building
Miami 32, Florida
Attorney for Plaintiffs
/s/ Leo M. Alpert

Stipulated and agreed this 30 day of December, 1963.

ORDER

IT IS SO ORDERED,

DONE AND ORDERED in Miami, Dade County, Florida, this 2nd day of January, 1964.

EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

3.

Now, years later, it is asserted on the authority of **U. S. vs. Ohio Power Co.,** 353 U.S. 98, 77 S.Ct. (1957) that the interests of justice require this closed case to be re-

opened because of intervening decisions, irreconcilable, so it is urged, with this closed case.

Adjudication must become final at some point.

When this Court denied the Petition for Re-Hearing approximately three years ago that point was reached.

That three years later the Court may wish it had ruled differently three years earlier does not, we suggest, give this Court the right or power to disturb a dead case.

That this Court three years later may wish to recede from a rule it announced three years earlier, is another matter altogether. The heart of the judicial process is the re-shaping or changing of earlier rules in later cases —but not by retrospective application to cases past and done with.

Finality is one thing; Retrospection another; Retrospective Application (Retrospectivity) still a third.

B

The Justice of Finality

Ohio Power enunciated a principle that "finality of litigation" must yield to the "interests of justice."

In the case at bar the Employer and the Carrier have a claim on justice also. Is it justice to require them to unsettle what they have settled? Or to require them to resuscitate an issue dead as to them with all the factors

that time has blurred and worn away from memory? Or to require them to make a defense to something new? To something that did not even exist at the time of their litigation?

Suppose this Court reverses and has to remand for a new hearing (and the supposition of a new hearing is not imaginative as we will later show if the Court does wish to reverse.) A new hearing over three years after a case was closed and over seven years after the accident has no claim on justice. We do not know whether the security employee who investigated the accident is available; we do not know if the other witnesses are available.

II

THE MERITS - ECKER'S CASE

A

Distinctions Between Ecker and Gondeck

The main thrust of Petitioner is the recent decision in **O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc.** —Ecker's Case—85 S. Ct. 1012, (March 29, 1965.)

We conceive the Court was misled in Ecker's Case, but misled or not, **Ecker** and **Gondeck** are two different cases and the decision in one does not control the other.

ITEM 1: In **Ecker** it was stipulated " . . . . that all employees worked on a 365 day per year basis when outside of the United States. * * * (See 222 F. Supp. at Page 7, Paragraph 10 of Stipulation.)

Not so with **Gondeck** who worked only regular and stated hours.

That alone is sufficient to distinguish away **Gondeck** from **Ecker.**

But the District Judge in **Ecker** further distinguished **Gondeck** away: He said:

ITEM 2: "In the Gondeck case the employee at the time of injury was, in the words of the Fifth Circuit in denying recovery (299 F.2d 77):

> ' * * * In an expedition made in the employer's jeep, which the employees were prohibited from using for such purposes.'
>
> In the case now before this Court the deceased Ecker was, by the terms of his employment, confined to the limits of the Korean area for two years; during that time he was on a 365-day per year work basis subject to the call of his employer at any time. It was reasonable to conclude that recreational activities contributed to a higher efficiency of the employer's work and that when conducted in the restricted area of employment, **on a work day, so to speak, and in a manner not prohibited by the employer,** [emphasis supplied] such activity was an incident of the employment. I further conclude that the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose."

Thus, **Ecker** disappears as a basis for conflict.

ITEM 3: The legal issue in **Ecker** is whether an employee hired to work at an overseas defense base 365 days of the year is to be deemed within the course of employment when injured while engaged in recreation.

The legal issue in **Gondèck** (phrasing it as close to Ecker as possible in order to give Petitioner every benefit is whether an employee hired to work at an overseas defense base with regular hours of employment is to be deemed within the course of employment when (using the Deputy's own words and Finding in Gondeck for which see Page A15 of Petitioner's Petition for Certiorari at line 5 from top of page)

" . . . . **when, having completed his day's work . . .**" (emphasis supplied) he was injured while engaged in recreation.

The difference between the two cases is as day from night on this legal issue. (There are other differences also; the transportation, etc., but the above are the parallel differences that separated **Gondeck** from **Ecker.**)

III

THE MERITS — ROSE'S CASE

Distinctions between Rose and Gondeck

Rose is a case in which compensation was granted and with good reason, if we may be permitted to say so. Rose, an American, was driving a motor scooter on Grand

Turk Island in the British Bahamas on the right side of the road—because he was an American—when he should have been on the left side according to the British rules of the road. That is what caused his death in a collision between his scooter and a truck. Said the Court: 338 Fed. at 321:

> " * * * The Commissioner drew the inference that Rose's long ingrained habit of right hand driving asserted itself when confronted with an emergency traffic situation. By veering to the right instead of to the left, he put his scooter onto a collision course."

We have no quarrel at all with this.

IV

THE MERITS — SMITH'S CASE

Distinctions Between Smith and Gondeck

Smith was a passenger, with Gondeck, in the same jeep, in the same accident. The testimony and record was different in **Smith.** There is no ratiocination by the Fourth Circuit Court of Appeals in Smith nor any discussion of the principles or the pros and cons. There is a flat statement—more authoritative than persuasive—and a remark that **IF** the record in both cases were the same the Fourth Circuit would deferentially disagree with the Fifth. But is the record the same?

Apparently not: Smith, says the Fourth Circuit, "was provided sleeping quarters and meals at the power

station." Gondeck did not eat and sleep at the power station. Smith, says the Fourth Circuit, did not involve transportation supplied by the employer. Gondeck did.

The differences are substantial enough to account for the different result, but we also should like to say—and now go into—the matter of judicial review and whether **Smith** and **Ecker** are sound or products of an erroneous view pressed home by a centralized administration that is seeking a specific result not sanctioned by law and for Congress alone.

V

The Errors of Ecker

It is unfortunate that the compensation field has not attracted the best legal analysis, philosophy and thinking. The reason is that in the compensation field the issues did not involve substantial sums of money, until relatively recently. For example, it has been only within the last eight or ten years that many of the limits in State Compensation Acts have been removed so that for all practical purposes a workman, injured permanently and totally, will be supported for the rest of his life on a weekly payment of anywhere from $42 to $70 a week and in addition will be guaranteed such reasonable medical care and attention as the nature of the injury or the processes of recovery might require. Thus now there may be an exposure of several hundred thousand dollars whereas before it was only tens. So also the Federal Longshoremen's Compensation Act contained a limitation until 1956 when compensation for permanent and total disability became unlimited.

As a result of the inability of this field to attract the best legal analysis, research, philosophy and thinking, a great deal of lopsided information and tendentious matter has been presented to the courts. The compensation field is highly technical—as any field can be expected to become when it is comprehended entirely by a statute nearly forty years old many portions of which are "litigiously prolific" "arising out of and in the course of an enigma," and require thoughtful application to an ever-changing field. The generalization royal is apt to fall flatter in the compensation field than in many another.

So what the government has done in its centralized control and handling of the Federal Longshoremen's Compensation Act is to endeavor to see that a certain result is reached, deemed beneficent by the administrators. Indeed what has been presented as maxims in this field makes one think inevitably of Stephens' comment that considering the vast amount of misinformation conveyed by legal maxims they ought not be called maxims at all but minims.

In **Ecker** as in **Smith** there are errors due to lopsided presentation, we suggest.

A

This Court, for example, in **Ecker** refers to Section 20(a) of the Longshoremen's Act as providing that in any proceeding for the enforcement of a claim for compensation it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the Act. That presumption has long and uniformly—that is uniformly up to the time of the opinion in Ecker—been held to be a presumption that disap-

pears in any case where evidence is offered. See for example **John W. McGrath Corp. v. Hughes,** 264 F.2d 314 (C.A. 2d 1959).

B

Another is the reference to the inferences that a Deputy Commissioner may draw and the insulation of such inferences from judicial review. To use the language of the opinion in Ecker:

> "The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record as a whole' * * * * *"

Now the "inferences" that **Cardillo** spoke of and the inferences that **O'Leary** spoke of were inferences of fact, not inferences of law. If that is disputed and if it is now thought that Deputy Commissioners have the right to draw inferences of law then that contention was set aside and laid to rest in **O'Leary,** which very plainly applied the Administrative Procedure Act of 1946, which provides, as this Court says, that the Deputy Commissioner's Order may be suspended and set aside by a reviewing court if not in accordance with the law.

Of course it is true that questions of "law" and questions of "fact" are not easily if at all separable in many instances. (Over thirty years ago the writer concluded that abstract definitions of them were impossible. See **Alpert, Suits Against Administrative Agencies,** 12 N. Y. U. L. Q. Rev. (1935) at 398.)

Justice Frankfurter, speaking for the Court in **O'Leary**, with his usual felicity enunciated the problem and principle, 340 U.S. at 507-508, 71 S. Ct. at 472:

> "The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of 'fact'. Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact'. Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law'."

The doctrines of judicial review strike with a different incidence the assortment of administrative tribunals our law displays. In addition, and as a matter of course, the doctrines of judicial review must strike the assortment of administrative awards, orders, findings, etc., with a different incidence. Some administrative orders are in the nature of rules, some in the nature of policy or procedural declarations, some in the nature of interpretation, some in the nature of the determination of an individual claim, just like a lawsuit, garden variety.

A determination by a deputy commissioner of the

compensability of a particular claim is more akin to a judicial determination of a particular case than it is to anything else.

Thus, however much it may be said that in certain instances questions of law and questions of fact become so mixed that it cannot be determined whether they are the one or the other, or partake of both, it is ineluctable that in **Ecker**, in **Smith**, in **Gondeck**, the issue was strictly one of the law.

In **Ecker** the issue was whether an employee who was working 365 days of the year was to be deemed within the course of employment when injured while engaged in reasonable recreation off the premises. In **Gondeck**, the issue was whether an employee who had regular hours of work was to be deemed injured in the course of his employment when engaged in reasonable recreation off the premises and on his own time. Note that the question is not whether a particular recreation is reasonable, but whether reasonable recreation is covered under the law—i.e., the statute.

There is no greater expertise in a deputy commissioner for a determination of this question than in a court.

The standard is so severable from the experience of industry and so basic to the legal structure as to be particularly appropriate for independent judicial ascertainment as a question of law. We will now demonstrate that.

C

The Longshoremen's Act passed in 1927, is a complete and well thought out entity. It has been construed many times and its provisions had well defined areas of application when in 1941 the matter came before Congress of providing compensation for disability or death on defense bases overseas.

The purpose of the Defense Bases Act said the House Committee in reporting it (See Report No. 1070 of the House Committee in the 77th Congress, First Session, dated July 29, 1941) is to provide substantially the same relief for injuries or death of employees at bases leased by the United States from Great Britain or any other country **as existing law provides for similar employees in the United States** and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates.

Had Congress wished a wider coverage to be given under the Defense Bases Act to employees at defense bases than to employees doing the same work in the United States, then Congress could have so enacted. The proof positive of this is that Congress did broaden the scope of the coverage of the Longshoremen's Act in one respect when it enacted the Defense Bases Compensation Act. It provided in Section 1651 (a)(4) of the Defense Bases Act that coverage

> "shall include any injury or death occurring to any such employee during transportation to and from his place of employment, where the em-

ployer or the United States provides the transportation or the cost thereof."

That is the only extension of coverage provided by Congress for defense base workers.

In the Federal Employees Compensation Act, for example, Congress broadened coverage to include any injury proximately resulting from a war risk hazard whether or not the injured person was in actuality engaged in the course of his employment at the time of the injury. (See 42 U.S.C. Sec. 1781.)

Because Congress did not in fact broaden the coverage in the Defense Bases Act and because the coverage was well defined in the litigation of the fourteen years previously, all of which it must be presumed Congress knew, and, knowing, approved of because Congress did not seek to change it, it is our submission that the doctrine of reasonable entertainment invented by deputy commissioners to reach what they conceive to be a beneficient result is entirely indefensible. When an Act of Congress is lacking (if it be so, which we doubt) it is not for an administrative official to invent or construct a doctrine to cover the lack that he finds in the Congressional provision.

That the deputy commissioners invented the doctrine of reasonable recreation is beyond question. An impartial observer and writer in the field, Warren L. Hannah, himself formerly a Referee of the Industrial Accident Commission in California, in his book FEDERAL REMEDIES FOR EMPLOYEE INJURIES (1955) says at page 56 to 57:

> " * * * The same construction is also placed upon the provisions governing compensability with the exception that the doctrine of so-called 'recreation activity' has been invented to apply, under certain circumstances, to off-duty injuries occurring in locations subject to Defense Bases Act jurisdiction. This doctrine is based on the assumption that the maintenance of employee morale in foreign surroundings is a matter of employer concern, that employers may under such circumstances provide certain facilities to their employees for recreational purposes, and that injuries sustained in the course of using such facilities may be treated as falling within the scope of the employment."

Indeed what the deputy commissioners have invented is an interesting and odd application of orthodox compensation law concerning resident employees and traveling employees, the orthodox law being stated in Larson **Workmen's Compensation** at Section 24.00 and 25.00

As a result of this stretching and straining there are judicial opinions saying in effect that a Defense Base worker is in the same position as a sailor—he is a captive of his place of employment and is therefore entitled to be compensated for anything that may happen to him during his employment, unless caused by his wilful, wanton and intentional misconduct. **See O'Keefe v. Pan American World Airways, Inc. (Rose's Case),** 338 F2d. 319 (C.A. 5th 1964) at bottom of right hand column on page 322. A sailor with limited maintenance and cure, with the Laws of Oleron and the doctrine of wardship, is a far cry from workmen's compensation on a defense base

that may be an island or a continent. The analogy is used, however, and the compensation act so "beneficiently" construed.

But neither deputy nor court—and certainly not deputy—has the power to invent a new cellular rule of law. It is for Congress to legislate not for deputies to invent. Or when invented to pass off as a fact rather than the new law that it is.

And note that the doctrine of reasonable recreation, first invented to apply to recreation at facilities provided by the employer — vide **O'Leary** — is extended by **Ecker** to recreation not employe provided, nor employer sponsored.

"Arising out of and in the course of employment" is the Congressional requirement. If "reasonable recreation" is to be deemed within and arising out of the course of employment for defense bases employees, it is for Congress so to declare and define the ambit. Or for a court to enunciate as a matter of law, not accept as a fact.

The determination of what reasonable recreation may be in each specific case would then be properly before a deputy commissioner. But the invention or promulgation of the doctrine of reasonable recreation, without bounds, with no channel within which the deputy commissioner must confine himself, is not within the privilege of a deputy commissioner to assert as fact insulated from review.

In **Ecker** the question before the Court was this

question of law: Is a defense base employee hired to work 365 days a year in the course of employment when he is off premises, on his personal recreation, on holiday, not using any facility of his employer? If the law is that reasonable recreation is covered, without bounds, with no channel within which the deputy commissioner must confine himself, then the answer is yes. If the law is that reasonable recreation on one's own hook, on one's own time, off premises, etc., is not covered, then no.

That is not a question of fact nor does it deal with the integrity of the administrative process. It is a question of law about as pure as they come.

It was this confusion about fact and law that actually caused the split in **Ecker.** It was this effort to cast **law** into **fact** that largely accounts for the difficulty in these cases.

We submit the Court should recede from **Ecker.**

VI

In Gondeck there is one other matter that should be called to the attention of the Court. That is the vice in the determination by the deputy commissioner of rendering an ultimate judgment rather than making adequate findings of fact and proper conclusions of law.

It is this tendency on the part of the deputy commissioners under the Longshoremen's Act to render ultimate judgments rather than to make adequate findings of fact and conclusions of law which in part creates a cloudy atmosphere in which the government can expound

a point of view that the issue before the court is not one of law but is one in which the fact and law have become so inextricably connected that the determination is best left to a deputy commissioner.

The government in these compensation cases has borrowed heavily from those administrative determinations which partake more of policy and rule than of the rights of a specific person to collect a specific amount of money.

Once this is made to appear without the trimmings of the fancy words and of "expertise administration" the basic simplicity of what we are dealing with will emerge.

Even if certiorari were to be granted in this case, the order of the deputy did not find that the injury was one arising out of and in the course of employment. That this was so both the government and the intervenor admitted in their respective briefs before the Fifth Circuit Court of Appeals. Both argued that the finding should be said to be implicit in the conclusion of the deputy commissioner but it was our contention before the Fifth Circuit Court of Appeals that a reversal would have to take place on that ground alone. The Fifth Circuit Court of Appeals did not touch this point, however, because more basic was that the deputy's findings of fact were not supported by substantial evidence.

Thus even if certiorari were here granted, the case would have to be re-tried rather than simply having the writ issue. Re-trial after so much time and after the case was closed is an injustice.

VII

MOTION FOR ORAL ARGUMENT

We move, if the Court be inclined to pursue **Gondeck** further, that oral argument and full briefing be granted not only in **Gondeck** but also in **Ecker** so that these cases might be orally argued at the same time with the consequent benefit that such give and take and probing scrutiny bestows.

VIII

It is our submission, in conclusion:

1. Time has made so many changes, irreversible in Gondeck, that time and finality require a denial of the extraordinary petition for re-hearing.

2. Justice to the Employer and Carrier, their counsel and representatives require the doctrine of finality to be applied.

3. If the rule of Gondeck is sought to be reversed it should be reversed prospectively and not retrospectively.

4. The rule in Gondeck is sound as applied to the facts in Gondeck.

5. The distinctions between Ecker and Gondeck, the working by the employee in Ecker on a 365 day per year basis, which was not true in Gondeck, the injury "on a work day, so to speak, and in a manner not prohibited by the employer", which was not true in Gondeck, make the one case not in conflict with the other.

6. The legal issue in Ecker and the legal issue in Gondeck are not the same.

7. The distinctions between Rose and Gondeck are so obvious as to require no extended discussion.

8. The difference in record between Smith and Gondeck justify, if such be, the difference in judgment.

9. The basic legal principle, in Ecker, however, although not in conflict with Gondeck, is an erroneous legal principle pressed upon the Court without due and proper analysis, research and thought.

10. The basic question in Ecker is a question of law—that of reasonable recreation—and not one of fact.

11 The doctrine of reasonable recreation is a doctrine not provided by Congress but invented by deputy commissioners and being law, is not to be accepted as fact but reviewed as law.

12. Oral argument should be granted in this case and in Ecker if the extraordinary petition for re-hearing is to be granted.

Respectfully submitted this _____ day of June, 1965.

LEO M. ALPERT
1112 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Response to Extraordinary Petition for Re-Hearing were served upon Arthur Roth, Esq., 1111 Ainsley Building, Miami, Florida, attorney for Petitioner, to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon this _____ day of _____ 1965.

_____

LEO M. ALPERT

FILED
OCT 18 1961
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,
Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS,
INCORPORATED and
THE TRAVELERS INSURANCE COMPANY,
Respondents,

EXTRAORDINARY PETITION FOR REHEARING

ARTHUR ROTH
1111 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

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EXTRAORDINARY PETITION FOR REHEARING

REPORT OF THE DECISION IN THIS CASE.

This case is reported at 299 F.2d 74, cert. denied, 370 U.S. 918, rehearing denied, 371 U.S. 856 (Oct. 1962).

STATEMENT

COMES NOW the Petitioner JEANETTE B. GONDECK, by and through her undersigned attorney, and moves the Court to grant her rehearing on her Petition for Writ of Certiorari to the United States Court of

Appeals for the Fifth Circuit to review its judgment affirming the United States District Court for the Southern District of Florida, which set aside the award of the Deputy Commissioner for the Sixth Compensation District awarding benefits for the death of her husband pursuant to the Defense Bases Compensation Act, Title 42 U.S.C., Section 1651. The Petitioner moves the Court to waive the provisions for finality of litigation as set forth in Rule 58(4), of this Court's Revised Rules, and prays the Court to apply the rule herein as established in **United States v. Ohio Power Co.**, 353 U.S. 98 (1957).

For good cause for granting rehearing herein, the Petitioner will show unto the Court:

1.) That there have occurred intervening circumstances of substantial and controlling effect.

2.) This Court on March 29, 1965, granted a petition for certiorari to the United States Court of Appeals for the Fifth Circuit and reversed the decision of that Court on the same issues presented in this cause, establishing that the Petition herein was well-taken. **O'Keeffe vs. Smith, Hinchman & Grylls Associates, Inc., (Ecker's case)** No. 307, 33 L. Week 3317 (March 29, 1965), reversing, 327 F.2d 1003.

3.) The United States Court of Appeals for the Fourth Circuit has now considered Smith's case, Gondeck's companion, who was also killed in the same accident, and affirmed the award of compensation benefits to Mrs. Smith, and further expressed disagreement with the decision of the Fifth Circuit in the Gondeck

case. This Court denied employer's petition for certiorari, **Pan American World Airways v. O'Hearne**, 335 F.2d 70 (4th Cir. 1964), cert. denied, 33 L.Week 3322 (March 29, 1965), No. 474.

4.) The Fifth Circuit has apparently, by an entirely different panel, rejected the holdings in the Gondeck case. **O'Keeffe v. Pan American World Airways, (Rose's case)**, 338 F.2d 319 (5th Cir. 1964), cert. denied, 33 L.Week 3322 (March 29, 1965) No. 852.

5. The cause herein has not been irrevocably closed in that no motion has ever been presented to the District Court to implement the mandates of this Court or of the Court of Appeals, nor has the Deputy Commissioner ever entered an order rejecting the claim for compensation, thereby tolling the commencement of the running of the time for a petition to the Deputy Commissioner for review and modification. Title 33 U.S.C., Section 922.

REASONS FOR GRANTING REHEARING

I

The Requirements Of Rule 58(4) Should Be Waived In The Interest Of Justice

Rule 58(4), of this Court's Revised Rules, should be waived in the interests of justice.

This Court has established sufficient precedent for such waiver where relief of an obvious injustice can be corrected only in this Court. **United States v. Ohio Power Company**, 353 U.S. 98 (1957):

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our judgments, both in civil and criminal cases." 353 U.S. 98, 99.

Five workers were in the jeep when the accident occurred. One native, who was killed, is not covered by this Act. Of the other four, compensation benefits have been awarded to or on behalf of three; only Mrs. Gondeck and here daughter have been deprived of compensation.

In addition to the gross injustice of the denial of benefits to the survivors of Frank Gondeck, there is the uncertainty of uniformity, now existing between the Fifth Circuit and the Fourth Circuit, which only this Court can resolve:

> "If there is to be uniformity in the application of principles announced in those two companion cases, the judgment below in the instant case cannot stand." 353 U.S. 98.

II

The Fifth Circuit Misinterpreted Its Functions Pursuant to the Administrative Procedure Act.

Both the Ecker and Gondeck cases were submitted to Deputy Commissioner O'Keeffe on stipulated facts. The Fifth Circuit rejected his inferences, findings and

conclusions in both cases, holding that it could overrule the findings that reasonable recreation after hours is an incident of employment.

Under the Administrative Procedure Act, 5 U.S.C.A. §§ 1001-1011, this finding should be final as a reasonable inference from stipulated facts. This Court so held in Ecker's case, and specifically overruled the Fifth Circuit's concept of its functions under the Act.

Relying on **Cardillo v. Liberty Mutual Ins. Co.**, 330 U.S. 469, 477-478; **O'Leary v. Brown-Pacific-Maxon, Inc.**, 340 U.S. 504, 507-508, this Court said at 33 L.Week 3320:

> "The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

In summarizing the applicability of the Administrative Procedure Act, this Court added:

> "The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner, are to be accepted unless they are irrational or unsupported by substantial evidence on the record as a whole."

III

The Opinion Of The Fifth Circuit Is In Direct Conflict With This Court's Decision In Ecker's Case.

This Court in the Ecker case on March 29, 1965, resolved the two very issues proposed by the Petitioner herein, in her Petition: the substantive rights of off-shore defense base workers who are injured while seeking reasonable recreation in their limited areas of danger, and the scope of judicial review from the orders of deputy commissioners in compensation cases under the Administrative Procedure Act.

Both issues were resolved by this Court contrary to the result reached by the Fifth Circuit in both these cases, but leaves Mrs. Gondeck without redress. Because of the denial of her petition for review, the "law of her case" is now established, even though contrary to later pronouncements by this Court of different law.

The Ecker case was submitted to Deputy Commissioner William M. O'Keeffe on stipulated facts, as was the Gondeck case. He awarded benefits to each of the widows. In the four cases decided contemporaneously with each other on these very same points, three have now been resolved in favor of the widows, and only Mrs. Gondeck and her daughter stand without redress.

As held in the Ecker case, at 33 L.Week 3320 and apparently rejecting the Fifth Circuit's holding that Gondeck's going to town was not on the employer's business, nor to its benefit, this Court stated the general rule:

> "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer."

IV

The Fifth Circuit's Attempt To Distinguish This Case From Rose's Case Conflicts With The Fourth Circuit In Smith's Case.

The Fifth Circuit, by an entirely different panel, decided **Rose's case**, 338 F.2d 319, and attempted to distinguish it from its Gondeck opinion. The two principal distinctions noted are, (1) Rose had actually been called on emergency, whereas the Gondeck record did not reflect that Gondeck had (although the Deputy Commissioner found, based on stipulated facts, and company rule, that he was subject to 24-hour, seven-day-a-week call), and, (2) Gondeck had violated a company rule, but Rose had not.

Both these holdings were in direct conflict with those of the Fourth Circuit in **Smith's Case**, 335 F.2d 70.

Smith was Gondeck's companion. He was one of the men in charge of the jeep, who had actually been told that the jeep could not be used for private purposes (by stipulated facts). By further stipulation, it was agreed that Gondeck had never been notified of this company rule. Smith was subject to the same hours and call as was Gondeck.

However, the Fourth Circuit apparently did not consider these points controlling, because Smith knowingly (according to stipulated facts) violated the company rule that resulted in his death, whereas, Gondeck's violation, if any, was without knowledge. Nothing in the Longshoremen's and Harbor Workers Compensation Act makes

such violation a ground to deprive a widow and her daughter of their benefits, and the Fifth Circuit's attempted distinctions are as invalid as the Fourth Circuit found in Smith's case, where it was held:

> "The death of Smith's companion, Gondeck, was the subject of **United States v. Pan American World Airways, Inc.**, 299 F.2d 74 (5th Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome."

While we realize that there were actually differences of vital testimony by the same supervisors in both the Smith and Gondeck cases, the least that should be done is to have the case remanded to the Deputy Commissioner for the taking of further testimony to resolve the conflicts of testimony.

The Fifth Circuit's ruling in this case, that compensation should not be awarded for injury and death suffered during recreation not supervised or organized by the employer, from which the employer receives no direct benefit, has been overruled by this Court in Ecker's case. In addition, the Fifth Circuit's holding that the courts have authority to review inferences drawn from stipulated testimony, is also overruled. However, these rulings are general, but cannot change a later consideration of this case.

The Fifth Circuit has held that however innocent a worker may be in violating an undisclosed regulation, he may not recover compensation, and reiterated its

holding in **Rose's case**, supra. The Fourth Circuit has held that there is no statutory provision to sustain such a denial of an award.

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay in the final determination of the cause. I further certify that the Petition is restricted to the grounds set forth, the intervention of circumstances of substantial and controlling effect, and other substantial grounds not previously presented.

ARTHUR ROTH

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Leo M. Alpert, 1112 Biscayne Building, Miami 32, Florida, attorney for Respondents to Lloyd G. Bates, Jr., Assistant United States Attorney, Post Office Building, Miami, Florida; and to the Attorney General, Department of Justice, Washington 25, D.C., by depositing same in the United States Post Office with first class postage prepaid thereon this ____day of April, 1965.

ARTHUR ROTH

GONDECK *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

ON MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

No. 919, October Term, 1961. Certiorari denied June 11, 1962.—Rehearing denied October 8, 1962.—Rehearing and certiorari granted and case decided October 18, 1965.

Petitioner's husband while off duty was killed outside an overseas defense base where he was employed. The Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor, having found that at the time of the accident decedent was subject to emergency call and was returning from reasonable recreation, awarded petitioner death benefits under the Longshoremen's and Harbor Workers' Compensation Act. The District Court set the award aside and the Court of Appeals affirmed, finding no benefit to the employer in decedent's trip and no relation between the accident and his employment. This Court denied certiorari in the October 1961 Term and a petition for rehearing the next Term. Thereafter another Court of Appeals upheld an award arising from another employee's death in the same accident, relying on *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, which held that the Deputy Commissioner's award under the Act may be based on his finding that the obligations and conditions of employment create the "zone of special danger" out of which the injury or death arose. The Court of Appeals which decided this case expressed doubt in a subsequent case that its decision below conformed to *Brown-Pacific-Maxon*, and noted that but for a *per curiam* judgment (reversed last Term in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U. S. 359) the *Gondeck* case stood alone. *Held:* Since the Court of Appeals misinterpreted the standard in *Brown-Pacific-Maxon* and since of those eligible petitioner alone had not received compensation for the accident here involved, the "interests of justice would make unfair the strict application of [the Court's] rules" by which the litigation here would otherwise be final. *United States* v. *Ohio Power Co.*, 353 U. S. 98, 99.

Rehearing and certiorari granted; 299 F. 2d 74, reversed.

Arthur Roth for petitioner.

Leo M. Alpert for respondents.

PER CURIAM.

Petitioner's husband, Frank J. Gondeck, was killed as a result of a jeep accident on San Salvador Island outside a defense base at which he was employed. The accident took place in the evening as Gondeck and four others were returning from a nearby town. The Deputy Commissioner of the Bureau of Employees' Compensation, United States Department of Labor, awarded death benefits to petitioner in accordance with the terms of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* (1958 ed.), as extended by the Defense Base Act, 55 Stat. 622, as amended, 42 U. S. C. § 1651 *et seq.* (1958 ed.). In support of the award, the Deputy Commissioner found, among other things, that, although Gondeck had completed his day's work, he was subject to call for emergencies while off duty and was returning from reasonable recreation when the accident occurred. The District Court set aside the Deputy Commissioner's order, and the Court of Appeals for the Fifth Circuit affirmed. *United States* v. *Pan American World Airways, Inc.*, 299 F. 2d 74. The Court of Appeals acknowledged that Gondeck was subject to call, *id.*, at 75, but found no benefit to the employer in Gondeck's trip, and "no evidence that furnishes a link by which the activity in which Gondeck was engaged was related to his employment." *Id.*, at 77.

On June 11, 1962, we denied certiorari. 370 U. S. 918. On October 8, 1962, we denied a petition for rehearing. 371 U. S. 856. We are now apprised, however, of "intervening circumstances of substantial . . . effect,"* justifying application of the established doctrine that "the interest in finality of litigation must yield where the

*U. S. Supreme Ct. Rule 58 (2).

interests of justice would make unfair the strict application of our rules." *United States* v. *Ohio Power Co.*, 353 U. S. 98, 99. Subsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident. *Pan American World Airways, Inc.* v. *O'Hearne*, 335 F. 2d 70. In upholding the award, the court cited our decision in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. In a subsequent case the Court of Appeals for the Fifth Circuit itself expressed doubt whether its decision in the present case had been consistent with *Brown-Pacific-Maxon*. *O'Keeffe* v. *Pan American World Airways*, 338 F. 2d 319, 325. The court also noted that, "The Gondeck case stands alone, except for a per curiam opinion." *Id.*, at 325. This Court reversed that *per curiam* judgment last Term, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U. S. 359, so that the present case now stands completely alone.

In *O'Keeffe* we made clear that the determinations of the Deputy Commissioner are subject only to limited judicial review, and we reaffirmed the *Brown-Pacific-Maxon* holding that the Deputy Commissioner need not find a causal relation between the nature of the victim's employment and the accident, nor that the victim was engaged in activity of benefit to the employer at the time of his injury or death. No more is required than that the obligations or conditions of employment create the "zone of special danger" out of which the injury or death arose. Since the Court of Appeals for the Fifth Circuit misinterpreted the *Brown-Pacific-Maxon* standard in this case, and since, of those eligible for compensation from the accident, this petitioner stands alone in not receiving it, "the interests of justice would make unfair the strict application of our rules." *United States* v. *Ohio Power Co.*, *supra*, at 99.

We therefore grant the motion for leave to file the petition for rehearing, grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Appeals.

It is so ordered.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, joining in the judgment.

I fully agree with my Brother HARLAN "that litigation must at some point come to an end" and "that this decision holds seeds of mischief for the future orderly administration of justice . . . ." But with *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956), on our books, no other conclusion can be reached.

Up until *Cahill* I thought that successive petitions for rehearing would not be received by the Court under its Rule 58 (4).[1] This rule took the place of the old "end of Term" rule of *Bronson* v. *Schulten*, 104 U. S. 410, 415 (1882), abolished by the Congress in 1948, 28 U. S. C. § 452 (1958 ed.). Indeed, I doubted that the Court had the power to grant a successive petition for rehearing under a factual situation, as here, where a petition for certiorari had been denied over three years ago, 370 U. S. 918 (1962); a petition for rehearing had been denied, 371 U. S. 856 (1962); the mandate had issued more than three years before; and where petitioner had, about the same date, cancelled her appeal bond and been discharged of all liability thereunder. In *Cahill*, however, the Court through the device of a "motion to recall and amend the judgment" permitted a successive peti-

[1] "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received."

tion not only to be received but granted, despite the fact that the judgment thereby reopened had been previously paid.[2] This paved the way for the grant of a successive petition for rehearing in *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957), to make its judgment conform with this Court's decision that same Term in *United States* v. *Allen-Bradley Co.*, 352 U. S. 306 (1957), a companion case of *Ohio Power* in the Court of Claims.

The vice, of course, is the granting of successive petitions for rehearing in violation of Rule 58 (4), which was done for the first time in *Cahill*. It makes no difference that the rejection of finality be to correct alleged errors of our own or those below. Nor does it matter that the errors be corrected in the same Term, as in *Cahill*, or four Terms later, as here. In each instance the action violates Rule 58 (4) and that is the basis of my position.

I, too, as my Brother HARLAN said in *Ohio Power*, "can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." At p. 111 (dissenting opinion). However, *Cahill* opened up this practice. It may be that *Ohio Power* and the present case are more objectionable on their facts, but they merely condone *Cahill*'s original vice. Until we can gain the vote of the majority to the contrary we are stuck with the practice. The outlook for this appears dim. We can only hope that this rule of "no finality," which the Court varnishes with the charms of reason, will be sparingly used, or overruled by Congress, as was the "end of Term" rule. I, therefore, join in the judgment of the Court.

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[2] MR. JUSTICE BLACK, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and myself, dissented.

MR. JUSTICE HARLAN, dissenting.

The result reached in this case has been achieved at the expense of the sound legal principle that litigation must at some point come to an end.

I can find nothing in the train of events on which the Court relies in overturning this more than three-year-old final judgment that justifies bringing into play the dubious doctrine of *United States* v. *Ohio Power Co.*, 353 U. S. 98, a case which was decided by a closely divided vote of less than a full bench,[1] which deviated from long-established practices of this Court,[2] and which, so far as I can find, has had no sequel in subsequent decisions of the Court.[3]

The judgment against this petitioner became final as long ago as June 11, 1962. 370 U. S. 918. The Court refused to reconsider it four months later when it denied rehearing on October 8, 1962. 371 U. S. 856. When some two years later, July 13, 1964, the Court of Appeals for the Fourth Circuit upheld a compensation award with respect to a co-employee of Gondeck killed in the *same* accident, *Pan American World Airways, Inc.* v. *O'Hearne*, 335 F. 2d 70, petitioner did not even seek to file another petition for rehearing here. A few months later the Fifth Circuit might be thought to have indicated some doubt about its earlier decision in the *Gondeck* case, *O'Keeffe* v. *Pan American World Airways, Inc.*, 338 F. 2d 319, 325,

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[1] The vote was 4 to 3, MR. JUSTICE BRENNAN and Mr. Justice Whittaker, since retired, not participating. 353 U. S., at 99.

[2] See dissenting opinion of HARLAN, J., 353 U. S., at 99.

[3] My Brother CLARK's citation of *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183, *ante*, p. 28, for the proposition that this petition for rehearing must be granted is inapposite. *Cahill* was an FELA case in which this Court reversed summarily a judgment of the Court of Appeals overturning a district court judgment for the plaintiff, 350 U. S. 898. Later that same Term, after a petition for rehearing had been denied, 350 U. S. 943, the Court was persuaded on "a

but again no attempt was made to file a further petition for rehearing here in *Gondeck*.

It was this Court's decision of last Term in *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U. S. 359, which itself was a debatable innovation in this area of the law,[4] that triggered the undoing of this judgment of four Terms ago. It should be noted that the subject matter in *O'Keeffe* v. *Pan American World Airways, Inc.*, was an entirely *different* accident from the one in which petitioner's decedent was involved.

This, then, is hardly one of those rare cases in which "'the interest in finality of litigation must yield'" because "'the interests of justice would make unfair the strict application of our rules,'" *ante*, pp. 26–27. On the contrary, the situation is one in which the prevailing party in this litigation had every reason to count on the judgment in its favor remaining firm. Believing that this decision holds seeds of mischief for the future orderly administration of justice, I respectfully dissent.

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motion to recall and amend the judgment" that its mandate, which simply reinstated the District Court's judgment, was incorrect and that the case should properly have been remanded to the Court of Appeals for further proceedings. It is difficult for me to see how the correction during the same Term of our own error in *Cahill* can be thought to compel or justify a general "rule of 'no finality'" (as my Brother CLARK puts it, *ante*, p. 29) which requires the granting of a second petition for rehearing three years after the first one was denied in a case which this Court never heard.

[4] The case was decided without argument by a substantially divided Court, 380 U. S. 359. See dissenting opinion of HARLAN, J., joined by CLARK and WHITE, JJ., 380 U. S., at 365. See also separate opinion of DOUGLAS, J., 380 U. S., at 371.